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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 657

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

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INDEX

	Page
OPINION BELOW	2
Jurisdiction	2
Constitutional Provisions Involved	4
Questions Presented	5
Statement of the Case	8
REASONS FOR GRANTING THE WRIT	11
POINT I — A Declaratory Judgment Proceeding Which Is Sui Generis Cannot Be Used To Subvert The Constitutional Limitations On The Taking Of Privately Owned Land Without The Payment Of Compensation	11
POINT II — The Petitioner Is Entitled To The Protection Of The Rule In *Williams* v. *Thompson*, 256 S.W. 2d 399 (Tex. 1953) Which Denies To A Landowner The Right To Compel An Easement Holder To Provide Lateral Support For The Landowner's Land Which Abuts On The Easement Land	14
POINT III — The Petitioner Is Denied Due Process Of Law And Equal Protection Of The Law When A Motion For Judgment Which Raises An Abandonment Issue Is Not Treated As An Amendment To The Petitioner's Pleadings Or As A Proper Basis For New Trial	16
POINT IV — The Court Of Appeals Denied The Petitioner Due Process Of The Law When It Presumed That The Respondent's Toll Engineer's Unequivocal Testimony As To The Abandonment In Place Of The Respondent's Pipes And Cables Did Not Mean That The Respondent Had Not Abandoned Its Easements	18
CONCLUSION	19

APPENDIX: PAGE

A — Opinion of the Court of Appeals for the 14th Supreme District of Texas at Houston, Texas 1a

B — Data pertaining to location, size and value of 314,370 cu. yds. of sand and gravel taken from petitioner without the payment of compensation 16a

C — Summary of the grounds for new trial and assignments of error in which constitutional issues were raised 21a

TABLE OF CASES

Adam v. *Saenger*, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454 (1938) 3

American Federation of Labor v. *Swing*, 312 U.S. 321, 85 L. ed. 855, 61 S. Ct. 568 (1941) 15

American Railway Express Company v. *Levee*, 263 U.S. 19, 168 L. ed. 140, 44 S. Ct. 11 (1923) 3

Bailey v. *Alabama*, 219 U.S. 219, 239, 55 L. ed. 191, 31 S. Ct. 145 (1911) 19

Bridges v. *California*, 314 U.S. 252, 86 L. ed. 192, 62 S. Ct. 190 (1941) 15

Cantwell v. *Connecticut*, 310 U.S. 296, 84 L. ed. 1213, 60 S. Ct. 900 (1940) 15

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581 (1897) 15, 16

Cobb v. *Harrington*, 144 Tex. 360, 190 S.W. 2d 709 (Tex. 1945) 13, 16

Erie R. Co. v. *Tompkins*, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817 (1938) 15

Freeport Motor Casualty Co. v. *Tharp*, 406 Ill. 295, 94 N.E. 2d 139 (Ill. 1950) 16

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954) 3

Northern Transportation Company v. *Chicago*, 99 U.S. 635, 25 L. ed. 336 (1897) 12

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393, 67 L. ed. 322, 43 S. Ct. 158 (1922) 14

Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. ed. 1094, 73 S. Ct. 749 (1953) 3

PAGE

Radio Station WOW v. *Johnson*, 326 U.S. 120, 89 L. ed. 2092, 65 S. Ct. 1475 (1945) 3

Shelley v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 836 (1948) 15

Simon v. *Nance*, 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.) 12, 13

Williams v. *Thompson*, 152 Tex. 270, 256 S.W. 2d 399 (Tex. 1953) 6, 14, 15

OTHER AUTHORITIES

28 U.S.C.A. Sec. 1257(3) 3

U.S.C.A. Const. Amdmt. XIV, Sec. 1 ..... 4, 5, 11

Vernon's Ann. Tex. Const., Art. 1, Sec. 17 ..... 4, 5, 11

Vernon's Ann. Tex. Const., Art. 1, Sec. 19 ..... 4, 5, 11

Texas Rules of Civil Procedure

Rule 94 ..... 16, 17

Rule 67 17

Rule 299 ..... 18, 19

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

San Jacinto Sand Company, Inc., petitioner herein, prays that a Writ of Certiorari be issued to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas to review a judgment herein affirming the judgment of the District Court of Harris County, Texas, 157th Judicial District, and remand this case to the said Court of Civil Appeals with instructions that its judgment and the judgment of the trial court should be corrected to accord to the petitioner the protection of its property required by the Constitution of the United States and the Constitution of the State of Texas.

OPINIONS BELOW

The judgment of the 157th District Court of Harris County, Texas was set forth in a written judgment entered by the court. Thereafter the 157th District Court entered its Findings of Fact and Conclusions of Law in support of such judgment. The petitioner's Motion for New Trial was denied by the 157th District Court. The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas in support of its judgment herein (R.-Opn), printed in Appendix A hereto, *infra* pages 1a-15a, is officially reported at 426 S.W. 2d 338. The order of the said Texas Court of Civil Appeals overruling petitioner's Motion for a Rehearing was entered without opinion. The order of the Supreme Court of Texas denying petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered with the docket notation, "Refused. No reversible error."* The order of the Supreme Court of Texas granting the petitioner's Motion to File a First Amendment to Application for Writ of Error was entered without opinion.* The order of the Supreme Court of Texas overruling petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended was entered without opinion.*

JURISDICTION

1. The order of the Supreme Court of Texas denying petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered July 10, 1968. The petitioner's Motion to Amend Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District was granted by the Supreme Court of Texas on July 24, 1968. The Supreme Court of Texas on July 24, 1968 denied the

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* Order of Supreme Court of Texas dated July 24, 1968.

Application for Writ of Error as Amended. The petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended were overruled by the Supreme Court of Texas on July 24, 1968.

2. Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1257(3):

(a) The action of the Supreme Court of Texas, the highest court of the State of Texas, in refusing petitioner's Application for Writ of Error to review and correct the errors of law committed by the Court of Civil Appeals for the 14th Supreme Judicial District in its judgment herein, of which review is hereby sought, was to constitute the said Civil Court of Appeals the highest court of the State of Texas in which a decision hearing could be had within the meaning of 28 U.S.C. 1257. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954). The date, however, when the judgment and decision of the Court of Civil Appeals became final was July 24, 1968, when the Supreme Court of Texas overruled Petitioner's Motion for Rehearing on Application for Writ of Error, as amended. *American Railway Express Company* v. *Levee,* 263 U. S. 19, 168 L. Ed. 140, 44 S. Ct. 11 (1923); *Adam* v. *Saenger,* 303 U. S. 59, 82 L. Ed. 649, 58 S. Ct. 454 (1938).

(b) The judgment of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, of which review is hereby sought, is a "Judgment or decree within the meaning and contemplation of 28 U.S.C. 1257" *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent federal constitutional provision involved in this case is Amendment Fourteen, Section 1, of the Constitution of the United States, U.S.C.A. Const. Amdmt. XIV, Sec. 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the Constitution of the State of Texas involved in this case are: Article 1, Section 17 and Section 19 of the Constitution of the State of Texas:

> "§17. Taking, damaging or destroying property for public use; special privileges and immunities; control of privileges and franchises
>
> "Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . ."
>
> "§19. Deprivation of life, liberty, etc.; due course of law
>
> "Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

QUESTIONS PRESENTED

The petitioner, as the owner of a 17.584 acre tract, and the respondent, as the holder of two easements located on such tract, disagreed as to whether the respondent's easements were entitled to lateral support and if the easements were entitled to lateral support, whether the obligation to provide lateral support included an obligation to protect the easements from the erosive action of the San Jacinto River?

In its affirmation of the trial court's declaratory judgment, which provided that the respondent's easements must be provided with lateral support and protected from the erosive action of the San Jacinto River, the Court of Appeals stated, "None of the appellant's (petitioner's) due process or other constitutional rights have been violated in this case." (Appendix A, p. 15a); and "The problems in this case are difficult, for to grant adequate relief to appellee (respondent) the appellant (petitioner) must suffer loss and damage, and its rights to excavate valuable sand and gravel from its land must be reduced." (Appendix A, p. 13a).

The issues here presented are whether in affirming the trial court's determination of the correlative rights of the parties, the Court of Appeals applied principles of law which are constitutionally deficient within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 17 and 19 of Article 1 of the Constitution of the State of Texas? In particular:

1. Did the Court of Appeals deprive the petitioner of its constitutional right to be compensated for 314,370 cu. yds. of sand and gravel taken from it, when the Court of Appeals did not reverse and remand the case to the trial court with instructions that the judgment entered by the

trial court in this declaratory judgment proceeding was excessive and could not be sustained unless through eminent domain proceedings that could be instituted by the respondent with leave of the trial court or a monetary award made by the trial court, the judgment was modified to assure the payment to the petitioner of fair compensation for the 314,370 cu. yds. of sand and gravel taken from the petitioner when the trial court imposed upon the petitioner, as the landowner, the absolute burden of supporting the respondent's easements and protecting them from the erosive action of the San Jacinto River, which protection was given by the entry of a permanent injunction that:

(a) Prohibited any excavation by the petitioner in a 200 ft. x 399 ft. strip of land paralleling the east bank of the San Jacinto River; and

(b) Limited the petitioner's excavations in two 500 ft. strips on the south side of the respondent's easements by requiring the creation of residual slopes of repose in excess of 1 ft. vertical to 3 ft. horizontal, which is the slope of repose which the trial court found would be stable when all factors other than the action of the river were taken into account, namely the imposition of a residual slope requirement of 1 ft. vertical to 10 ft. horizontal in one 500 ft. strip and 1 ft. vertical to 5 ft. horizontal in another 500 ft. strip?

2. Was the petitioner unconstitutionally deprived of the equal protection of the common law of Texas when the Courts of Texas declined to follow the rule of *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (Tex. 1953) which provides that the doctrine of lateral support cannot be used to compel an easement owner to provide lateral support for the owner's land that abuts the easement land?

3. Did the Court of Appeals deny the petitioner due process of law and equal protection of the laws of the State of Texas when it held that the petitioner had not pleaded the issue of the respondent's abandonment of a portion of its easements, that the abandonment issue had not been tried by express or implied consent of the parties and the issue of abandonment was deemed to have been waived, even though the record shows that (a) the respondent by trial amendment placed in issue the *present location* of its easement, (b) the trial court's attention was invited to the abandonment issue by the petitioner's motion for judgment which was filed prior to the entry by the court of its final judgment, and (c) during oral argument on the motion for judgment the trial court's attention was invited to the evidence (respondent's documentary records and the testimony of the respondent's engineer) which clearly revealed that an abandonment of portions of the easements had been intended and that the abandonment had occurred.

4. Did the Court of Appeals unconstitutionally deprive the petitioner of due process of the law when, instead of reversing and remanding to the trial court for appropriate findings as to what the respondent's engineer meant when he said that the respondent had "abandoned its old pipe in place", the Court of Appeals resolved the uncertainty by assuming that the evidence could only be favorable to the respondent and said "The Toll Engineer *obviously* meant only that the old pipes which had been laid pursuant to the easements and which were replaced by a new pipe, were left in the ground because there was no point in taking them out." (emphasis supplied)

STATEMENT OF THE CASE

The petitioner's dredging activities on its 17.584 acre tract of land have been permanently "shut down" pursuant to injunctive relief granted the respondent. Injunctive relief was granted to the respondent to assure that lateral support would be provided for the respondent's three underground intercity cables located on the tract.

The trial court found the following facts in respect to lateral support of the respondent's easements:

> "27. The nature of the soil on the 17.584 acre tract is such that its stable slope of repose is approximately 3 to 1; i.e., 3 feet of slope for each one foot of depth. This would take into account the presence of water, and the rising or falling of the river level but would not take into account the effect of river action or velocity of the current of the San Jacinto River on this soil. . . ."
>
> "29. The flow and velocity of the San Jacinto River must be taken into account in determining the effect of dredging operations and excavations on either side of the 30 foot strip within which Southwestern Bell Telephone's easements are located. The force of the flow of the river is directed against the east bank of the San Jacinto River at the point in question. The western boundary of Plaintiff's easement begins at the eastern bank of the San Jacinto River where the general erosive effect of the flow of the San Jacinto River is the greatest."

The trial court entered an order that:

(a) Permanently enjoined[1] the petitioner from conducting any excavations in a 200 ft. strip of land paralleling the east bank of the San Jacinto River;

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[1] The injunction has the collateral effect of making it impossible to recover the sand and gravel located north of the boundary in the most commercially marketable manner, i.e. dredging.

(b) Limited the petitioner's excavations in two 500 ft. strips by prescribing the maintenance of residual excavation slopes of repose in excess of 1 vertical to 3 horizontal, namely on the north side of the easements petitioner was ordered to leave the following residual slopes of repose:

Strip Distance from east bank of San Jacinto River	Slope of repose
200 ft. - 700 ft.	1 vertical 10 horizontal
700 ft. - 1200 ft.	1 vertical 5 horizontal

Land containing 314,370 cu. yds. of sand and gravel ("erosion protection land") was taken from the petitioner when the trial court imposed upon the petitioner the obligation of protecting the easements from erosion by the San Jacinto River. The location and value of the sand and gravel taken from the petitioner is shown in the attached Appendix B and is summarized below:

Area in which sand and gravel taken	Yardage taken	Value of sand taken	
		Retail Price $1.35 yd.	Royalty Price 15¢ yd.
		$	$
Area north of easements.....	180,570[2]	243,769	27,086
Area south of easements.....	133,800	180,630	220,070
	314,370	424,399	47,156

The respondent installed its original 27 quad. 19 gauge Beaumont-Houston A and B cables ("A & B Cables") on its first easement in 1946. The respondent installed its original 51 pair 19 guage Crosby-Houston cables ("Crosby Cables") on its second easement in 1954, which easement was 10 ft. north of the first easement. In 1966 in connection

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[2] Includes 159,900 yards to which access by dredge has been denied the petitioner by the injunction which prohibits excavations in the 200 ft. x 300 ft. strip.

with its completion of a new submarine crossing under the San Jacinto River, the respondent installed in the 10 ft. strip between its cables 197 ft. of larger cables and 180 ft. of protective 12 inch pipe and then connected the new and larger cables into the existing A & B Cables and Crosby Cables at a manhole which it also installed in the 10 ft. strip. The respondent then abandoned in place that portion of the A & B Cables and Crosby Cables (197 ft.) and the original protective 8 inch pipe located between the east bank of the San Jacinto River and its newly constructed manhole.

Although advised by its outside consulting engineers to protect its cables from the erosive action of the San Jacinto River by acquiring the portion of the 17.584 acre trust adjacent to the San Jacinto River by purchase or condemnation, the respondent declined to do so.

Drawings prepared under the direction of the respondent's Toll Engineer showed the respondent's intention to abandon the old pipe and cables. Two of these drawings were furnished to the U. S. Corps of Engineers (R. — S.F. Pltf. Exs. 15, 16). Two of the drawings were used in the respondent's internal operations (R. — S.F., Defd. Exs. 3, pp. 21, 29).

The trial court judge, in ruling on the petitioner's Motion for Judgment which set forth the abandonment issue, stated as follows:

> "THE COURT: Well, I find for the Plaintiff with respect to the matter of abandonment; also with respect to the matter of Plaintiff's being entitled to have covering over the conduit."

The petitioner raised the constitutional questions here involved in its: (1) Motion for New Trial; (2) Brief for Appellant filed in the Court of Civil Appeals; (3) Applica-

tion for Writ of Error to the Supreme Court of Texas; (4) and First Amendment to the Application for Writ of Error filed with the Supreme Court of Texas. The questions actually placed before the respective courts are compiled in the summary attached hereto as Appendix C.

REASONS FOR GRANTING THE WRIT

A declaratory judgment proceeding has been converted into a proceeding in the nature of an eminent domain proceeding whereby 314,370 cu. yds. of sand and gravel have been taken from the petitioner through state action without compensating the petitioner. The taking of the sand and gravel without the payment of compensation violates Sections 17 and 19 of Article 1 of the Constitution of the State of Texas, and Section 1 of the Fourteenth Amendment to the Constitution of the United States. In taking the sand and gravel the petitioner was denied equal protection of the common law of the State of Texas and due process of law.

I.

A DECLARATORY JUDGMENT PROCEEDING WHICH IS SUI GENERIS CANNOT BE USED TO SUBVERT THE CONSTITUTIONAL LIMITATIONS ON THE TAKING OF PRIVATELY OWNED LAND WITHOUT THE PAYMENT OF COMPENSATION

After determining that the respondent's easements would be supported in their natural state if the petitioner was required to excavate on the 17.584 acre tract in such a way as to leave residual excavation slopes of 1 ft. vertical to 3 ft. horizontal, the court, without providing for the payment of compensation to the petitioner, took the erosion

protection land containing 314,370[3] cu. yds. of sand and gravel from the petitioner in order to protect the respondent's easements from erosion by the San Jacinto River, such additional land being shown on the sketches that appear on page 17a of Appendix B.

The judgment of the trial court was constitutionally deficient because of its excessiveness, that is it allowed the taking of the erosion protection land containing 314,370 cu. yds. of the petitioner's sand and gravel without compensating the petitioner for such sand and gravel. The obligation to provide lateral support does not include the obligation to protect the respondent's easements from the erosive action of the San Jacinto River. The common law obligation to provide lateral support involves the supporting of adjoining land in its *"natural state without improvements"*. *Northern Transportation Company* v. *Chicago,* 99 U.S. 635, 25 L. ed. 336, (1897). *Simon* v. *Nance,* 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.).

In *Northern Transportation Company* v. *City of Chicago, supra,* the doctrine of lateral support was described as follows at page 339:

> ". . . The general rule may be admitted that every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his

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[3] The erosion protection land containing the 314,370 cu. yds. of sand and gravel represents the sand and gravel located above lateral support slopes of 1 ft. vertical to 3 ft. horizontal in the 200 ft. x 399 ft. strip paralleling the San Jacinto River; in the two 500 ft. strips south of the respondent's easements in which the court established excavation slopes in excess of 1 ft. vertical to 3 ft. horizontal; and in the area north of the respondent's easements and east of the 200 ft. x 399 ft. strip where excavation by dredging, the only commercially feasible method of excavation, is prohibited because access to the land through the 200 ft. x 399 ft. strip has been permanently denied to marine dredges and barges.

> own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. *But this right of lateral support extends only to the soil in its natural condition.*" . . . (emphasis supplied)

In *Simon* v. *Nance, supra,* the doctrine of lateral support was described as follows at page 1040:

> ". . . By the weight of authority it is a well-settled rule of the common law that an owner of land has an absolute right to the lateral support of adjoining land. In other words, he has the *right to have his land remain as it was in a state of nature,* and neither the adjoining landowner, nor any one else, can rightfully remove from the boundaries of the land the supports *which hold it in its natural position. . . .*" (emphasis supplied)

The trial court cannot by judicial fiat enlarge the common law doctrine of lateral support to include the protecting of the respondent's easements from erosion.

A declaratory judgment proceeding in Texas is neither legal nor equitable, it is sui generis. *Cobb* v. *Harrington,* 144 Tex. 360 190 S.W. 2d 709 (Tex. 1945). The taking of the erosion protection land containing the 314,370 cu. yds. of sand and gravel was an excessive act.

In light of the respondent's status as a public utility, the petitioner concedes that the court in the public interest could properly have granted the respondent the right to reopen the case and institute an eminent domain procedure pursuant to which the petitioner would be paid the fair value of the land taken from it, or in the alternative the court could continue the temporary restraining order in effect for a reasonable time to allow the respondent to physically relocate or remove its cables from the easement area or to arrange to provide the easements and the cables

contained therein with appropriate protection from the erosive action of the San Jacinto River.

The powers conferred upon the courts of Texas do not include the right to take from the petitioner the 314,370 cu. yds. of sand and gravel without arranging for the payment of fair compensation to the petitioner. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 67 L. ed. 322, 43 S. Ct. 158 (1922).

The respondent should not be allowed to subvert the petitioner's constitutional right to be compensated for the taking of the erosion protection land by resort to an invalid argument about lateral support of easements.

II.

THE PETITIONER IS ENTITLED TO THE PROTECTION OF THE RULE IN WILLIAMS v. THOMPSON, 256 S.W. 2d 399 (TEX. 1953) WHICH DENIES TO A LANDOWNER THE RIGHT TO COMPEL AN EASEMENT HOLDER TO PROVIDE LATERAL SUPPORT FOR THE LANDOWNER'S LAND WHICH ABUTS ON THE EASEMENT LAND

The imposition upon the petitioner of the obligation of providing lateral support of any kind for the respondent's easements unconstitutionally deprives the petitioner of the equal protection of the laws of the State of Texas. In *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (Tex. 1953), the Supreme Court of Texas held that the common law doctrine of lateral support was not applicable to the relationship that existed between easement holders and landowners. The court declined to require the holder of a roadway easement to provide lateral support for the landowner's land which abutted the easement holder's roadway. The court said at page 403:

"There are many American and English decisions on the doctrine of lateral support. . . . It is undoubtedly the rule in this state as well as in most other jurisdictions that each of two adjoining landowners is entitled to the lateral support of the other's land; this right is one of property necessarily and naturally attached to and passing with the soil. 1 Thompson on Real Property, Sec. 545, p. 654, citing Simon v. Nance, 45 Tex. Civ. App. 480, 100 S.W. 1038, which described the right as 'absolute'.

"*But as petitioners recognize in their argument, the parties to this suit are not adjoining landowners.* What we have is a respondent who is one of several owners of an easement in Hidden Road and petitioners who are owners not only of the adjoining land but of the fee title to the 15 feet of Hidden Road which respondent was improving when he destroyed the lateral support to petitioners' adjoining land." (emphasis supplied)

The Court of Appeals' affirmation of the trial court's judgment unconstitutionally deprived the petitioner of the protection of the common law of Texas as exemplified by the rule of *Williams* v. *Thompson, supra.* In applying the rule of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817 (1938) it is clear that the common law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the state. The action of the Court of Appeals in declining to apply the rule of *Williams* v. *Thompson, supra,* to the instant case constituted a denial to the petitioner of the equal protection of the laws of the State of Texas. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L. ed. 1161, 68 S.C. 836 (1948); *American Federation of Labor* v. *Swing,* 312 U.S. 321, 85 L. ed. 855, 61 S. Ct. 568 (1941); *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L. ed. 1213, 60 S. Ct. 900 (1940); *Bridges* v. *California,* 314 U.S. 252, 86 L. ed. 192, 62 S. Ct. 190 (1941); *Chicago,*

B. & Q. R. Co. v. *Chicago,* 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581 (1897).

III.

THE PETITIONER IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WHEN A MOTION FOR JUDGMENT WHICH RAISES AN ABANDONMENT ISSUE IS NOT TREATED AS AN AMENDMENT TO THE PETITIONER'S PLEADINGS OR AS A PROPER BASIS FOR NEW TRIAL

A judgment is not entered in a declaratory judgment proceeding until it has been signed by the trial judge. *Freeport Motor Casualty Co.* v. *Tharp,* 406 Ill. 295 94 N.E. 2d 139 (Ill. 1950). A declaratory judgment proceeding is sui generis. *Cobb* v. *Harrington,* 144 Tex. 360 190 S.W. 2d 709 (Tex. 1945).

The respondent at the commencement of the case filed a trial amendment to the prayer to its petition placing in issue the present location of the respondent's easements. The respondent's Toll Engineer testified that the respondent had abandoned 197 ft. of its old pipes and cables in place. The documentary records of the respondent produced at the trial showed the clear intention on the part of the respondent to abandon the easements. These facts were called to the trial judge's attention in the petitioner's motion for judgment and oral argument thereon prior to his signing of the final judgment.

The petitioner was unconstitutionally denied due process of the law and equal protection of the law when in light of the respondent's trial amendment, the testimony and documentary records of the respondent and the timely filing of the petitioner's motion, the Court of Appeals determined that the abandonment issue had not been pleaded in a manner that satisfied the requirements of Rule 94 of the

Texas Rules of Civil Procedure[4] and was accordingly waived, and that the issue of abandonment had not been tried by express or implied consent in a manner that satisfied the requirements of Rule 67 of the Texas Rules of Civil Procedure.[5]

This case was commenced and concluded by an invocation of the trial court's equity powers to grant injunctive relief. The nature of the declaratory remedy imposed upon the courts of Texas the obligation to exercise their discretion in a manner to do equity and justice to the parties. The petitioner was denied due process of law and equal protection of the laws of Texas when the courts failed to exercise such discretion.

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[4] Rule 94 of the Texas Rules of Civil Procedure provides as follows:

"Rule 94. Affirmative Defenses

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consolidation, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . ."

[5] Rule 67 of the Texas Rules of Civil Procedure provides as follows:

"Rule 67. Amendments to Conform to Issues Tried Without Objection

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of special issues, as is provided in Rules 277 and 279. Amended by Order of March 31, 1941."

IV.

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF THE LAW WHEN IT PRESUMED THAT THE RESPONDENT'S TOLL ENGINEER'S UNEQUIVOCAL TESTIMONY AS TO THE ABANDONMENT IN PLACE OF THE RESPONDENT'S PIPES AND CABLES DID NOT MEAN THAT THE RESPONDENT HAD NOT ABANDONED ITS EASEMENTS

The respondent's Toll Engineer testified that the respondent had abandoned in place portions of its original pipes and cables. The construction sketch and submarine crossing sketches prepared by the respondent's personnel showed the respondent's intention to abandon in place portions of its original pipe and cables (R-S.F., Defd.'s Ex. 3, p. 21, 29; Pltf.'s Exs. 14, 15) The Court of Appeals in considering the abandonment question stated (Appendix A, p. 10a):

> "... The Toll Engineer obviously meant only that the old pipes, which had been laid pursuant to the easements and which were replaced by a new pipe were left in the ground, because there was no point in taking them out. This does not mean that the easements were abandoned, especially when a new line had been laid between the old pipes at the same time. It is necessary to prove an intent to abandon in order for there to be an abandonment of an easement, and the evidence must be satisfied by clear and satisfactory evidence. . . ."

The Court of Appeals denied the petitioner due process of the law and the equal protection of Rule 299 of the Texas

Rules of Civil Procedure[6] when in the presence of evidence showing an intention on the part of the respondent to abandon the easements, the Court presumed that the Toll Engineer could not have meant that an abandonment had occurred. The presumption by the Court of Appeals of what the witness meant violated the petitioner's right to a trial of the issue of abandonment and thus deprived the petitioner of property without compensation. The Court of Appeals, as an instrument of the State, cannot presume a fact and deprive the petitioner of the right to due process of law and the right to be compensated for its property. "The power to create presumption is not a means of escape from constitutional restrictions." *Bailey* v. *Alabama,* 219 U.S. 219, 239, 55 L. ed. 191, 31 S. Ct. 145 (1911).

CONCLUSION

This case presents the interrelated constitutional questions of how a declaratory judgment proceeding can be converted into a procedure in the nature of an eminent domain proceeding whereby the petitioner's land (314,370 cu. yds. of sand and gravel) can be taken without according the petitioner the equal protection of the common law of Texas, without the payment of compensation to the petitioner and without affording the petitioner due process

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[6] Rule 299 of the Texas Rules of Civil Procedure provides as follows:

"Rule 299. Omitted Findings

"Where findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumption of finding upon any ground of recovery or defense, no element of which has been found by the trial court; but where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a findings requested shall be reviewable on appeal."

of the law. The constitutional transgressions involved in this case were justified by the Court of Appeals by the invocation of two overriding constitutionally deficient principles namely that (1) the petitioner's land can be taken without compensation if the protection of the respondent's land from erosion would be *"prohibitive and not feasible because of cost, maintenance and loss of time"* (Appendix A, p. 6a); and (2) the integrity of thousands of Texas easements must be protected without regard to the rights of the petitioner as a landowner. (Appendix A, p. 13a)

The interrelated constitutional questions presented in this case satisfy the most stringent standards of discretionary review of this Honorable Court.

Wherefore your petitioner respectfully submits that Writ of Certiorari should issue to the end that this Court may review the decision of the Civil Court of Appeals for the Fourteenth Supreme Judicial District of Texas to determine the propriety of its resolution of the constitutional questions involved and raised herein.

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APPENDIX A

Affirmed, and opinion filed March 6, 1968.

No. 81

SAN JACINTO SAND COMPANY, INC., APPELLANT

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, APPELLEE

Appeal from District Court of Harris County

Appellee, Southwestern Bell Telephone Company (Southwestern Bell), as plaintiff, brought suit against defendant, San Jacinto Sand Company, Inc. (Sand Company) and others as defendants, seeking a temporary injunction to prohibit defendants from making excavations which allegedly would result in the destruction of the cables, conduits, and equipment of Southwestern Bell, and further seeking a declaration of its rights as an alleged easement owner to lateral and/or subjacent support. During the hearing on appellee's application for temporary injunction, on November 29, 1966, all parties jointly moved to consolidate for all purposes the hearing on application for temporary injunction and the hearing of the cause on the merits.

The hearing on the application for temporary injunction and on the declaratory judgment was tried without a jury, and at the conclusion of the testimony after some delay, on May 22, 1967, the trial court granted appellee's application for temporary injunction and held that Southwestern Bell, as owner of two easements burdening a tract of land owned by Sand Company, was entitled to the reasonable enjoyment and use of its easements, and was entitled to exercise the rights, privileges and authorities granted thereby without interference, damage or destruction by

removal of the lateral and subjacent support of the easements through excavation of the sand, gravel and soil on the servient tract owned by the Sand Company.

This appeal has been perfected from the trial court's final judgment by San Jacinto Sand Company, Inc., as appellant. Southwestern Bell Telephone Company is appellee.

Appellant, Sand Company, is a Texas corporation doing business in Harris County and is engaged in the excavation and sale of sand and gravel. Appellee, Southwestern Bell, is a telephone company and public utility serving telephone customers in the Beaumont-Houston area and areas throughout and beyond the State of Texas. Appellant owns a certain 17.584 acre tract of land in Harris County, Texas, adjoining and east of the San Jacinto River, said property having been conveyed to appellant by deed from Sherwood E. Beverly, dated January 20, 1966, and duly recorded in the deed records of Harris County. In 1945 and 1954, two easements were executed by the then owners of the land to Southwestern Bell. Each easement specifically located the telephone lines across the property, the 1954 easement providing *that the lines should* extend approximately 10 feet north of and parallel with the 1945 easement lines. The easements provided that Southwestern Bell was granted the "right, privilege and authority to construct, reconstruct, operate, maintain, *or remove* lines of telephone and telegraph, or other signal or communication circuits, consisting of underground conduits, cables, manholes, markers and fixtures *as the grantee may from time to time require,* (with the right to cut down and keep cut down trees, brush, and stumps within ten feet of each side of said lines), on and under the property. . . .", and that the conduits and cables were required to be buried to such depth as not to interfere

with the ordinary cultivation of the land. Pursuant to the easement granted in 1945, Southwestern Bell installed in 1945 and 1946, certain equipment including underground intercity toll cables referred to as the Houston-Beaumont A and B cables. Pursuant to the 1954 easement, appellee installed in 1954, underground inter-city toll cables, referred to as the Crosby-Houston cables. The lines extend from the east bank of the San Jacinto River in an easterly direction and then generally in a north-northeasterly direction to the north property line of the 17.584 acre tract. The easements were referred to during trial as a 30-foot easement or easements to describe the 30-foot wide area used by appellee in the repair, operation, maintenance, etc., of its equipment, though by stipulation, reference to the 30-foot area was used by the parties as an identification device. The cables have not been replaced since they were originally installed except at the river crossing. Appellant, Sand Company, also owns a tract of land of about 20.099 acres located immediately adjacent to and south of the 17.584 tract and has extensively excavated sand and gravel from the surface of the 20.099 acre tract. Waters of the San Jacinto River have filled the excavations on that tract. Appellant and others were excavating and removing sand and gravel from the 20.099 acre tract for some time prior to the filing of this action.

The title of Sand Company to the 17.584 acre tract and the title to the two easements of Southwestern Bell derive from a common grantor, and appellant's chain of title clearly reflects the existence of appellee's easements, which were duly recorded. Sand Company acquired title to the 17.584 acre tract with actual knowledge that the tract was burdened with the two easements, and with actual knowledge that appellee had installed its cables and conduits pursuant to such easements.

The trial court found that the operation and maintenance of the conduits, cables, etc., have reasonably required the use of a ten-foot area on each side of the cables. Since the second easement is located ten feet north of the first easement, there is an overlap in the area used, and Southwestern Bell has utilized a strip approximately thirty feet in width for the entire length of the easements. In 1966, appellee began construction of a new river crossing under the San Jacinto River. The Houston-Beaumont A and B cables and the Crosby-Houston cable were connected to the new river crossing at a distance of approximately 192-197 feet east of the east bank of the San Jacinto River on the 17.584 acre tract. The new crossing consists of a 12-inch concrete coated pipe, which enters the east bank of the San Jacinto River at a point located between the two 8-inch steel pipes in which the Houston-Beaumont A and B cables and the Crosby-Houston cable had been installed. The 12-inch pipe terminates at a manhole at the 192-197 foot point on appellant's land, where the existing 27 quad, 19 gauge Houston-Beaumont A and B cables and the Crosby-Houston 51 pair, 19 gauge cable were brought into the manhole on the 17.584 acre tract and spliced into the three 37 quad, 19 gauge cables. The two 8-inch pipes from that poi[illegible]d to the river were thereby rendered useless. Th[illegible] an integral part of the communication syst[illegible]ouston and the area of Beaumont, Port Arthur and Orange. In addition, the cables involve high priority government circuits, press circuits, radio broadcast circuits, high-flying dispatch circuits, aviation control circuits and foreign exchange circuits.

The composition of the surface of the 17.584 acre tract is largely common sand and gravel. Certain areas of the tract contain deposits of sand and gravel at least to the extent of 15 to 30 feet below the surface, and appellant

claims that there are deposits of sand in commercially marketable quantities extending to a depth of about 60 feet. Beginning about November, 1966, appellant prepared the surface of the 17.584 acre tract for excavation. Soon thereafter, the Sand Company began dragline excavations to the north and to the south of appellee's easements and the cables and conduits placed pursuant to the easements. Excavation of the 17.584 acre tract was discontinued as the result of a temporary restraining order obtained by appellee. Appellant stipulated that it did not intend directly to extract any sand from beneath the easements of appellee, and accordingly it stated that excavation operations would not be conducted within the 30-foot strip extending from the east bank of the San Jacinto River in a generally eastern direction for approximately 1,747 feet and then in a generally northeastern direction to the northern boundary of the tract.

In the course of the trial, hydraulic, soil and structural engineers testified, and the trial court found, that prosecution of appellant's plan of development would destroy the lateral and subjacent support of appellee's easements and the destruction of the cables, conduits, manholes, etc., placed pursuant thereto. The natural ground surface of the 17.584 acre tract is about 15 to 18 feet above the surface level of the water flowing in the San Jacinto River. The trial court further found that if excavations proceeded on either side of the 30-foot easement strip, the strip would deteriorate, and that if there were dredging operations to a depth of 60 feet on either side of the easement, the surface land would disappear, and deterioration would begin long before a 60-foot depth is reached. The trial court found from the evidence that alternatives would be impracticable, such as rerouting of appellee's lines, installation of aerial crossings, use of steel sheet piling bulkheads on either

side of the easements, etc., and though technologically possible, such alternatives would be prohibitive and not feasible because of cost, maintenance, and loss of time.

In order to provide lateral and subjacent support for Southwestern Bell's easements, the trial court decreed that the entire natural east bank of the San Jacinto River, along the west boundary of the 17.584 acre may not be further disturbed, and that no excavation may be made east of the east bank of the river for a distance of 200 feet; that no excavation may be made on land which forms the easements, the 30-foot strip. South of the easements at a point 200 feet east of the river and extending east 500 feet from that point, a stable residual slope of 3 horizontal to 1 vertical measured from natural ground level at the south easement line to mean sea level (river surface) and a residual slope of 10 horizontal to 1 vertical from mean sea level to the depth of the excavation below mean sea level was allowed. Parallel to the east river bank 200 feet back, 3 to 1 slope to mean sea level and a slope of 5 to 1 from mean sea level to depth of the excavation below mean sea level was ordered. For the remainder of the tract a 3 to 1 slope was permitted. North of the easement line a 3 to 1 slope was ordered 200 feet east of the river extending easterly throughout the tract and 200 feet from the river. The trial court further ordered that supplemental equitable relief may be provided by the court from time to time on application of any party.

Appellant attacks the judgment of the trial court by twenty-one points of error. By points five, six and seven, appellant contends that appellee is trespassing upon the 17.584 acre tract from a point approximately 197 feet back westerly to the San Jacinto River, and that appellee has abandoned the two 8-inch lines for that distance and has replaced the old lines with the new 12-inch pipe up

to the manhole constructed in 1966, which lies between the two 8-inch pipes above referred to. While appellee, Southwestern Bell, did relocate and remove its line by placing a 12-inch pipe between the two 8-inch pipes for a distance of 197 feet, no greater burden on the servient estate was imposed by such change. *Cantu* v. *Central Power & Light Co.*, 38 S.W. 2d 876 (Tex. Civ. App.), writ ref. The original 8-inch lines were parallel lines approximately eight to ten feet apart, and the discontinuance of use of the old lines by replacement with the 12-inch line lessened the burden upon the servient estate owned by appellant. Fort Quitman Land Co. v. Mier, 211 S.W. 2d 340, 343 (Tex. Civ. App.), writ ref., n.r.e.; 2 Thompson on Real Property (Replacement Ed., 1961), Sec. 426, p. 694; 21 Tex. Jur. 2d 175; 28 C.J.S., p. 777; Shammel v. Vogl, 396 P.2d 103 (Montana Sup.); Burris v. Peoples Ditch Co., 37 P. 922 (Calif. Sup.).

Appellant claims that the 1966 installation amounted to an expansion of Southwestern Bell's easement rights. The existence of an unauthorized expansion of easements turns on a proper construction of the written agreement of the parties. See Houston Pipe Line Co. v. Dwyer, 374 S.W. 2d 662, 664 (Tex. Sup.). As stated above, each of appellee's easements provides, in part, that the easement carries with it the,

> "right, privilege, and authority to construct, reconstruct, operate, maintain, repair, or *remove* . . . conduits, cables, manholes, markers and fixtures *as the grantee may from time to time require.*" (Emphasis added)

The principal decisions relied upon by appellant are the Dwyer case, supra, and Winslow v. City of Vallejo, 84 P. 191 (Calif. Sup. 1906), the latter case being cited as authority in the Dwyer opinion. In Dwyer, plaintiff sought

a judgment declaring that a pipeline easement terminated as a result of defendant having removed an 18-inch low pressure pipeline and replacing it with a 30-inch high pressure pipeline. Defendant answered that its easement right had not terminated and in the alternative, sought to condemn a right-of-way and easement. The agreement creating the easement contained no specification as to the size of the pipeline. It provided that the pipeline company had "A right of way to lay, maintain, operate, repair, and remove a Pipe Line for transportation of gas." The parties struck out the word "remove" and also deleted a paragraph that gave the pipeline company the right to construct additional pipelines. Additionally, they provided that the pipeline company would have the authority to remove the pipeline on termination of the easement. Stating that a proper determination of the case turns on a construction of the agreement between the parties, the Texas Supreme Court held:

> (1) "(T)hat the terms 'operate' and 'maintain' in the granting clause are at least broad enough to include the right to remove and replace the original pipe with pipe of the same size when necessary.
>
> (2) That unlike the situation that existed in Knox v. Pioneer Nat'l Gas Co., 321 S.W. 2d 596 (Tex. Civ. App. 1959, writ ref., n.r.e.), there was no language in the agreement between the parties which could be construed to permit a grantee a right under the agreement in excess of the right actually used, i.e., a right to increase the size of the pipe in excess of 18 inches in diameter.
>
> (3) Emphasizing the fact that the parties had deleted the word 'remove', the Court held that in installing the 18-inch pipe with the consent and acquiescence of the plaintiff, the extent of defendant's easement rights under their agreement became fixed and certain "De

> fendant was not authorized to remove this 18-inch line initially constructed and replace it with a line of substantially greater size.

In Winslow v. City of Vallejo, supra, an easement granting the City of Vallejo a right of way for "any water pipes or mains which may be laid by the city.", such pipes to be covered by not less than 1½ feet of ground, and to be "laid and maintained on present surveyed line as near as may be." was involved. The Supreme Court of California held in favor of the grantor-landowner and said that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right with the acquiescense and consent of both parties in a particular court or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed. The City of Vallejo had sought to lay an additional 14-inch pipe about three feet from the 10-inch pipe originally installed. The court held that the most that could be said regarding the language of the easement was that the grant was indefinite as to the number of pipes, and that the city, having originally elected to lay one pipe, was bound by such election.

The language of the present agreement between the parties clearly demonstrates the propriety of appellee's action in substituting the single 12-inch pipe for the two 8-inch pipes. Particular attention is directed to the fact that the easements expressly provide appellee with the right to *reconstruct or remove conduits, cables and fixtures as the grantee may from time to time require.* The plural is used throughout. We believe a proper construction of the easements involved in this case warrants the placement of the 12-inch pipe between the two 8-inch pipes with a resultant replacement and non-use of the two 8-inch pipes. The inclusion of the above language demonstrates that

the parties intended that Southwestern Bell be permitted to remove or expand its use of the easements as appellee might from time to time require, at least to place the 12-inch pipe between and in lieu of the old pipes within the 30-foot area. Knox v. Pioneer Natural Gas Co., 321 S.W. 2d 596 (Tex. Civ. App), writ ref., n.r.e.; Cantu v. Central Power & Light Co., supra.

Moreover, appellant's above claims do not affect appellee's alleged right of lateral support of its easements. Until appellant advanced its abandonment theory, over five months after the trial of the case, it argued that appellee had valid prescriptive easements. Even if it be held that appellee trespassed to some extent or had improperly expanded its easements, its right to lateral and subjacent support would not be affected. Such alleged enlargement and trespass could not affect the quantity of sand and gravel that the Sand Company could excavate from the property. It is important to note that in the Dwyer case, while the Supreme Court held that the easement owner had expanded its easement rights and that the land owner would thus have condemnation rights, the Supreme Court expressly held that the easement owner's expansion did not constitute a termination of its easement rights.

Appellant contends that appellee abandoned the easements from the river to a point 197 feet into the 17.584 acre tract where the new manhole was placed in 1966, and cites the testimony of Mr. Jaenacke, appellee's Toll Engineer, to the effect that when the new line was placed, the old pipe was abandoned in place in support of its contention. The Toll Engineer obviously meant only that the old pipes, which had been laid pursuant to the easements and which were replaced by a new pipe, were left in the ground because there was no point in taking them out. This does not mean that the easements were abandoned,

especially when a new line had been laid between the old pipes at the same time. It is necessary to prove an intent to abandon in order for there to be an abandonment of an easement, and the intention must be satisfied by clear and satisfactory evidence. Dallas County v. Miller, 166 S.W. 2d 922 (Tex. Com. App.), opinion adopted; 1 Tex. Jur. 2d, Sec. 10, p. 8. Although in the present case there was clearly not a non-use of the easement, the decisions uniformly hold that mere non-user does not in itself constitute abandonment. Dallas County v. Miller, supra. The use for which appellee acquired its easements has not failed. See Griffith v. Allison, 96 S.W. 2d 74, 77 (Tex. Com. App.), opinion adopted. There was no pleading of abandonment, which is an affirmative defense, and failure to plead it results in its waiver. Rule 94, T.R.C.P.; See Chapman v. Tyler Bank & Trust Co., 396 S.W. 2d 143 (Tex. Civ. App.), writ ref., n.r.e. We hold that the issue of abandonment was not tried by express or implied consent, and that the findings and implied findings of the trial court that there was no abandonment are supported by the evidence.

By various points of error, appellant contends that appellee, while it is entitled to such rights as may be necessary and essential to reasonable enjoyment of the easements, is nevertheless not entitled to lateral and subjacent support for the easements in question, and that appellant may with impunity excavate sand and gravel from its 17.584 tract as it sees fit. Appellant stipulated that it would not, however, extract sand from beneath the easements or within the 30-foot area where the lines are located. But the evidence clearly shows that such restriction agreed to will not solve the problem, and that within a short time, if appellant pursues its plan of excavations, all lateral and subjacent support of the lines, manhole and other equipment will be lost.

The grantee of an easement is entitled to such rights as are incident, essential or necessary to the enjoyment of such easement. Williams v. Thompson, 256 S.W. 2d 399 (Tex. Sup.). An easement, however, gives no exclusive dominant right over the servient land unnecessary to the enjoyment of such easement, and the dominant owner (easement owner) must make a reasonable use of the right so as not unreasonably to interfere with the property rights of the owner of the servient estate. Magnolia Pipeline Co. v. McCarter, 52 S.W. 2d 663 (Tex. Civ. App), no writ hist.; Texas-Louisiana Power Co. v. Webster, 59 S.W. 2d 902, 905 (Tex. Civ. App.), affirmed, 91 S.W. 2d 302. As was held in Simon v. Nance, 100 S.W. 1038 (Tex. Civ. App.), no writ, the existence of the right to lateral support is an absolute right and is not subordinate to any right of the adjoining proprietor. Appellant, however, contends that rights of an adjoining proprietor differ from the rights of an easement owner as against the landowner, or the rights of the owner of the dominant estate as against those of the owner of the servient estate. We hold that the duties and obligations as between the owners of the dominant estate and the servient estate, if different, are greater and more clearly defined than the rights as between adjoining landowners, by reason of the contractual relationship of the parties under the authority and the rules of law cited above. In contrast, in the present case, there is a special relationship between appellant and appellee and the interests of land involved. The prior owners of the 17.584 acre tract encumbered, for valuable consideration, the tract of land for the benefit of appellee. The owners of the servient estate sold and guaranteed the right to use the easement for the purposes stated. Appellant is in privity with its predecessors in title, and took with actual and constructive notice of Southwestern Bell's easements. Accordingly, there is even more reason to conclude that an easement is entitled to lateral support.

Whether we say that necessary lateral and subjacent support of the easements here involved is an incident of appellee's right to the complete enjoyment of the easements, or whether lateral and subjacent support is a separate right of property makes little practical difference. All of the testimony in this case points clearly to the fact that some formula or some means was necessary to regulate the excavations and removal of sand and gravel, or appellee's telephone lines and equipment would have no support. They would, in fact, have been left suspended in the air. The State of Texas is blanketed with many thousands of easements. Although most of these are privately owned, practically all serve public purposes. The tremendous transportation and communication systems servicing the state are dependent upon the integrity of these easements. Many of the streets, roads, and highways of the state are built on easements. The distribution of electric power is dependent upon easements as is practically all telephone service. Pipelines and railroads generally rely entirely on easements. Under the view taken by appellant, these interests in land would be potentially reduced to mere licenses at will.

The problems in this case are difficult, for to grant adequate relief to appellee the appellant must suffer loss and damage, and its right to excavate valuable sand and gravel from its land must be reduced. But to our minds the equities and legal rights of the parties are clear. We hold that the owner of the dominant estate, the easement owner, is entitled to lateral and subjacent support for its easements, its lines and its property lawfully thereon, and that the trial court correctly applied the doctrine of lateral and subjacent support. Salt Lake City v. J. B. & R. E. Walker, Inc., 253 P. 2d 365 (Utah Sup.); Village of Haverstraw v. Eckerson, 118 N.Y.S. 337, aff'd., 84 N.E. 578, 20 L.R.A., N.S. 287; City of Troy v. Murray, 219 N.Y.S. 681; Cincinnati & Sub-

urban Bell Telephone Co. v. Eadler, 61 N.E. 2d 795 (Ct. App. Ohio); Scranton v. Peoples Coal Co., 100 A. 818; East Ohio Gas Co. v. James Bros. Coal Co., 85 N.E. 2d 816 (Ohio); Sumrall v. United Gas Pipe Line Co., 97 So. 2d 914 (Miss. Sup.). The Texas courts have impliedly recognized that easements are entitled to lateral support. In Calvert v. Harris County, 46 S.W. 2d 375 (Tex. Civ. App.), writ ref., a condemnation suit, the condemnees attempted to recover as a part of their damages the loss of mineral rights relating to the minerals underlying the surface of the land taken for road purposes. The court rejected condemnee's contention. In the first place, the condemnor did not acquire the minerals. "The settled rule is that in condemnation proceedings only an easement is acquired." Secondly, the oil and gas in question could be extracted by easement which was taken. The court said:

> "In Lewis, Eminent Domain, Vol. 2 (3rd Ed.) page 1268, we find this statement: 'When an easement is taken for a railroad or other public use, the owner of the fee retains title to the minerals with the right to remove them, *subject to the right of support* for the railroad or whatever may be put upon the land, and to the right of exclusive use of the surface.' See Southern Pac. R. Co. v. San Francisco Savings Union, 146 Cal. 290, 79 P. 961, 964, 70 L.R.A. 221 . . ." (Emphasis added)

Appellant, in an attempt to equate its rights with the rights of a mineral or oil and gas lessee, contends that its excavations and removal of sand and gravel from its land places it in the position of a mineral lessee or owner, and cites the case of Warran Petroleum Corp. v. Monzingo, 304 S.W. 2d 362 (Tex. Sup.) in support thereof. Appellant contends that its right to remove "minerals" was absolute, and consequently there is no duty befalling appellant to provide lateral support. The position is untenable. The leading Texas decision bearing on the meaning of the

term "minerals" as it is used in the Texas law concerning mines and minerals is Heinatz v. Allen, 217 S.W. 2d 994 (Tex. Sup.). Sand and gravel under the circumstances of this case are not minerals. Psencik v. Wessels, 205 S.W. 2d 658 (Tex. Civ. App.), writ ref.; Winsett v. Watson, 206 S.W. 2d 656 (Tex. Civ. App.), writ ref.; See 40 Tex. L. Rev. 163. Compare Street v. Sinclair Pipeline Co., 386 S.W. 2d 350 (Tex. Civ. App.), no writ hist., with Kenny v. Texas Gulf Sulphur Co., 351 S.W. 2d 612 (Tex. Civ. App.), writ ref., both decisions by the same court. The case of Cline v. Henry, 239 S.W. 2d 205 (Tex. Civ. App.), writ ref., n.r.e., cited by appellant, involving a waiver of homestead rights, is unpersuasive and is not in point.

None of appellant's due process of other constitutional rights have been violated in this case. The trial court's holding that removal or change in the type and nature of the easement rights of appellee is not feasible under the circumstances is fully supported by the evidence. Moreover, the trial court's methods of providing for lateral and subjacent support for appellee's easements outlined above is supported by the evidence, and the trial court's remedy was the only solution developed by the testimony. Appellant's defense was principally that no lateral support was required. Under the difficult and complex circumstances, the trial court's remedy was reasonable and necessary to protect appellee's easement rights. The trial court provided for supplemental relief on application of the parties to relieve inequities and hardships which might develop in the future, and we believe the judgment is in all things correct.

We have carefully reviewed each contention made by appellant, and finding no error in the trial court's judgment, it is affirmed.

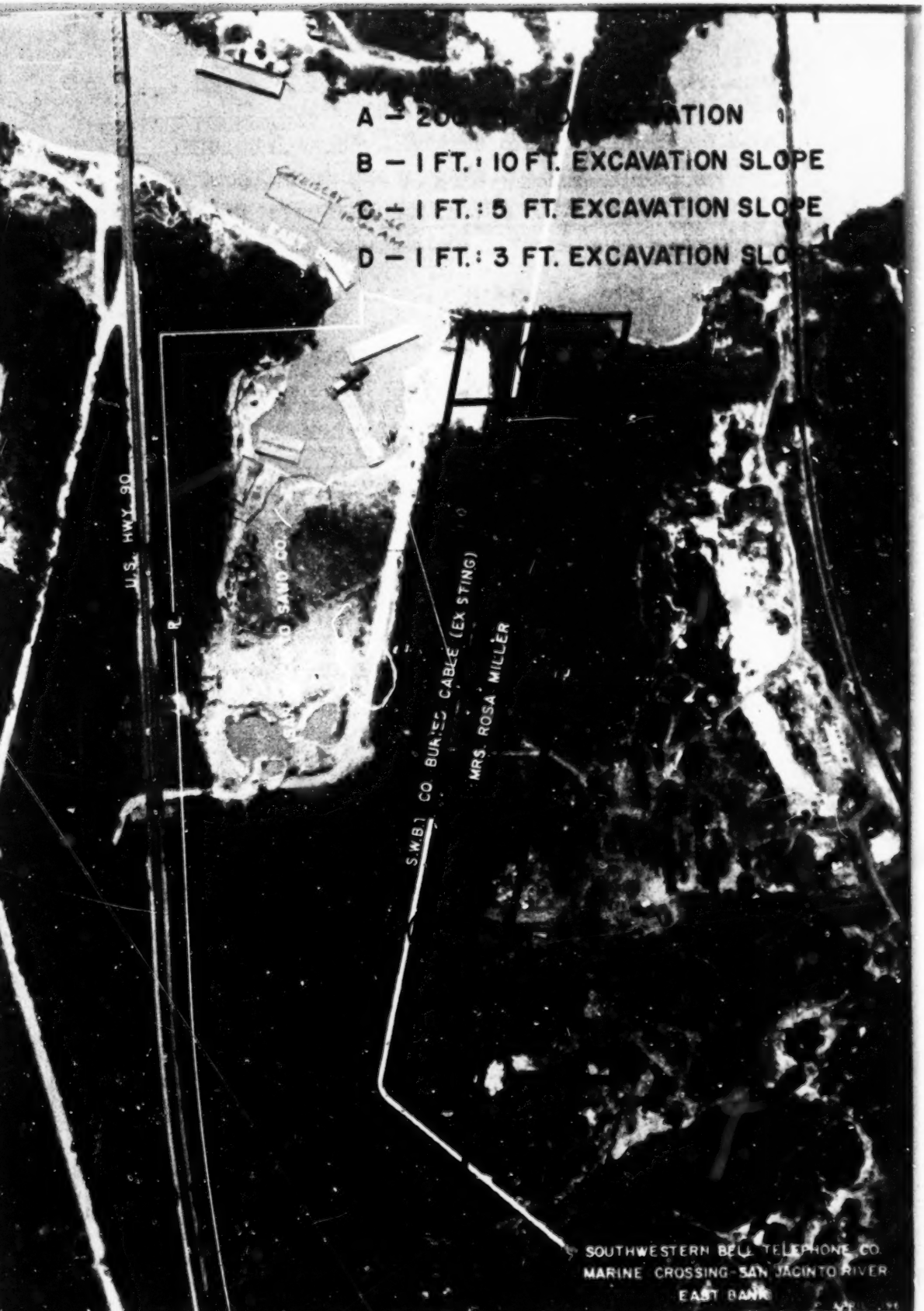
/s/ John M. Barron
Associate Justice

Judgment rendered, and opinion filed March 6, 1968.

APPENDIX B

DATA PERTAINING TO LOCATION, SIZE AND VALUE OF 314,370 cu. yds. OF SAND AND GRAVEL TAKEN FROM PETITIONER WITHOUT THE PAYMENT OF COMPENSATION

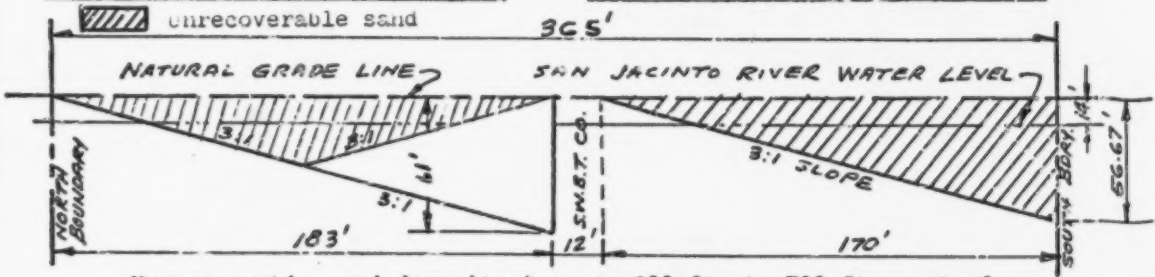
		Page No.
1.	Picture of 17,584 acre tract with notations as to areas taken from the petitioner	1
2.	Sketch of areas containing sand and gravel taken from the petitioner	2
3.	Computation of value of 314,370 cu. yds. of sand and gravel taken without the payment of compensation	3
4.	Survey showing the 17.584 acre tract	4


A – 20 [illegible] ATION
B – 1 FT. : 10 FT. EXCAVATION SLOPE
C – 1 FT. : 5 FT. EXCAVATION SLOPE
D – 1 FT. : 3 FT. EXCAVATION SLO
U.S. HWY. 90
SAND BOX
S.W.B.T. CO. BURIED CABLE (EX STING)
MRS. ROSA MILLER
SOUTHWESTERN BELL TELEPHONE CO.
MARINE CROSSING - SAN JACINTO RIVER
EAST BANK

Unrecoverable sand deposits in area 200 ft. east of east bank of the San Jacinto River as result of imposition of:

200 ft. no excavation requirement
20,070 cu. yds. lost

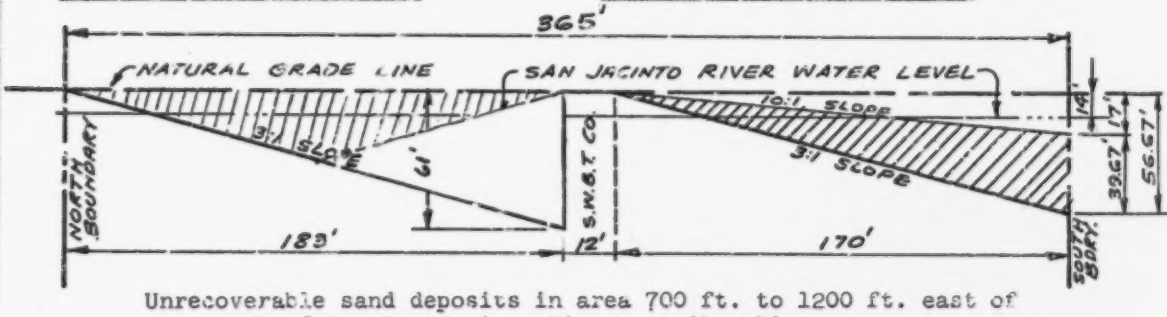
200 ft. no excavation requirement
35,080 cu. yds. lost



Unrecoverable sand deposits in area 200 ft. to 700 ft. east of the east bank of the San Jacinto River attributable to:

denial of access by dredge
51,680 cu. yds. lost

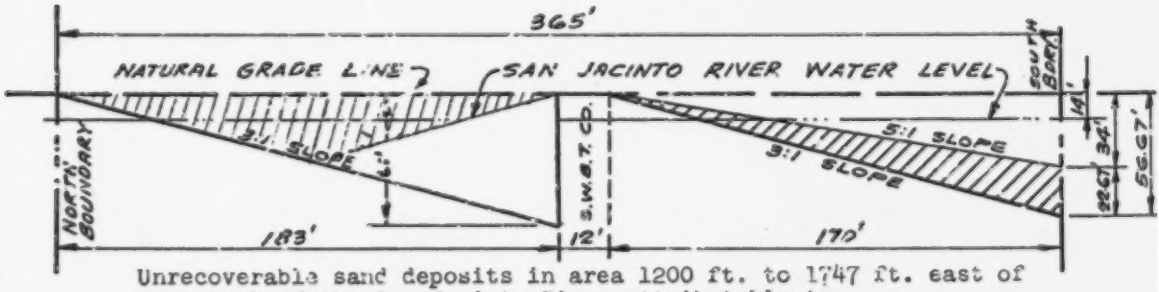
1 to 10 slope requirement
62,440 cu. yds. lost



Unrecoverable sand deposits in area 700 ft. to 1200 ft. east of east bank of the San Jacinto River attributable to:

denial of access by dredge
51,080 cu. yds. lost

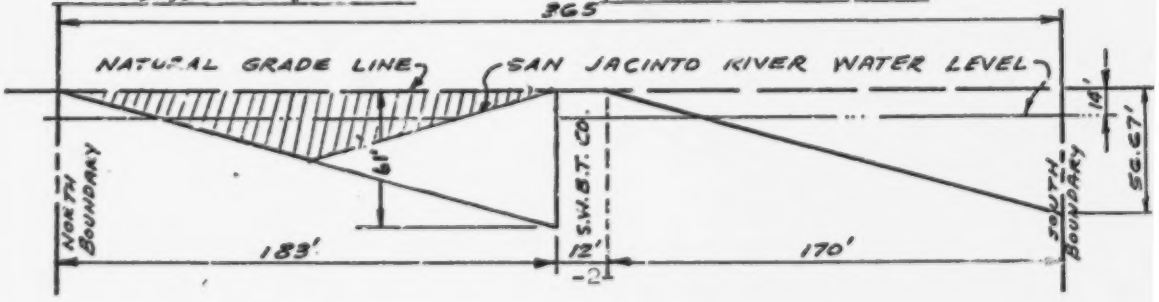
1 to 5 slope requirement
35,080 cu. yds. lost



Unrecoverable sand deposits in area 1200 ft. to 1747 ft. east of east bank of the San Jacinto River attributable to:

denial of access by dredge
50,540 cu. yds. lost

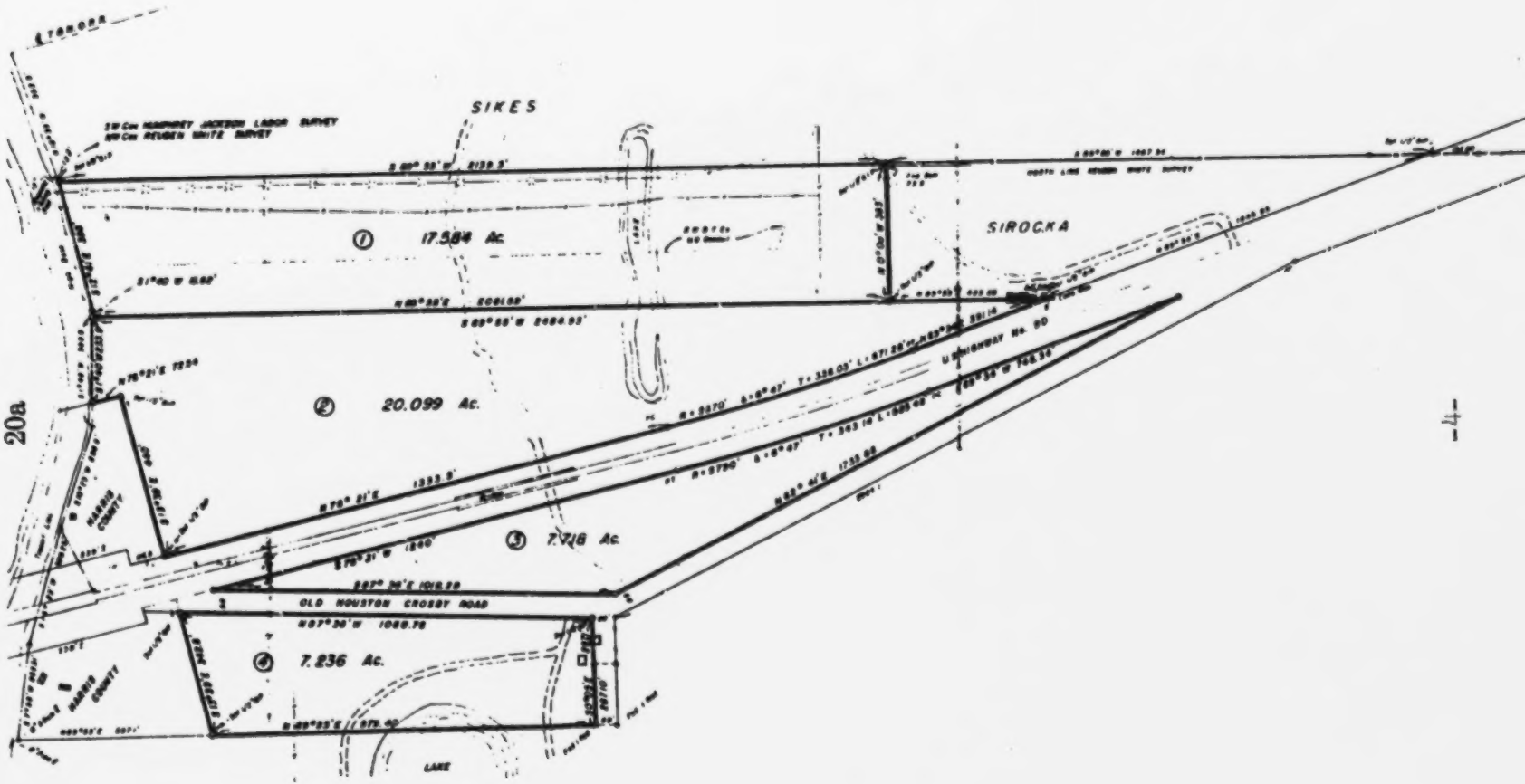
1 to 3 slope requirement



APPENDIX B

COMPUTATION OF VALUE OF SAND TAKEN FROM PETITIONER WITHOUT COMPENSATION

Area in which sand and gravel taken	Yardage taken	Value of sand taken	
		Retail Price $1.35 yd.*	Royalty Price 15¢ yd.
		$	$
Area north of easements:			
0 ft. - 200 ft. east of river	20,670	27,904	3,101
200 ft. - 700 ft. east of river	51,680	69,768	7,752
700 ft. - 1200 ft. east of river	51,680	69,768	7,752
1200 ft. - 1747 ft. east of river	56,540	76,329	8,481
Area south of easements:			
0 ft. - 200 ft. east of river	35,680	48,168	5,352
200 ft. - 700 ft. east of river	62,440	84,294	9,366
700 ft. - 1200 ft. east of river	35,680	48,168	5,352
		424,399	47,156


SIKES
SIROCKA
17.584 Ac.
20.099 Ac.
7.218 Ac.
7.236 Ac.
OLD HOUSTON CROSBY ROAD
HARRIS COUNTY
LAKE
U.S. HIGHWAY No. 90

20a

APPENDIX C

SUMMARY OF THE GROUND FOR NEW TRIAL AND ASSIGNMENTS OF ERROR IN WHICH CONSTITUTIONAL ISSUES WERE RAISED

1. Motion for New Trial filed May 26, 1967.

Ground 20:

> *"TWENTIETH:* The judgment is contrary to law in that the prohibition of excavations in the 200 foot strip of the 17.584 acre tract located east of the east bank of the San Jacinto River and north and south of the respective southern and northern boundaries of the 17.584 acre tract constitutes an unconstitutional taking of property without due process of the law. The evidence clearly reveals that if the residual slopes recommended by Mr. Van Sickle were established in the 200 foot strip the easements would have their proper support. The Plaintiff as holder of the easement has the obligation to maintain any such slopes in operating condition. *West* v. *Giesen; Cozby* v. *Armstrong, supra.* If the Plaintiff desires to subject to its control portions of the Defendants' land not subject to its easements, the Plaintiff as a public utility can do so through appropriately instituted condemnation proceedings, in which the Defendants' interests will be protected by due process."

2. Brief on Appeal filed with the Court of Civil Appeals in the appeal from the 157th District Court of Harris County, Texas.

Point of Error Eight and Eighth Point of Error Restated, pp. 5, 15:

> "The trial court, as a matter of law, unconstitutionally deprived appellant of its property when it enjoined appellant's excavation of said from the 197

foot strip of land paralleling the San Jacinto River. (Germane to Point 20, Motion for New Trial)."

The assignment of error was discussed at pages 45-52 of the Brief on Appeal.

3. Application for Writ of Error filed in the Supreme Court of Texas on May 8, 1968.

Points of Error Nos. 7 and 17 state the constitutional questions at pages 9 and 12 of the Application for Writ of Error.

POINT OF ERROR NO. 7

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land without due process by the imposition of excessive standards of lateral support. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing.)"

POINT OF ERROR NO. 17

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land without due process by the imposition of excessive standards of lateral support. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing.)

Point of Error No. 7 was discussed in detail at pp. 36-40 of the Application for Writ of Error. Point of Error No. 17 was encompassed in a discussion of the adverse effects of the respondent's taking of the petitioner's land, but was not separately discussed.

4. First Amendment to Application for Writ of Error accepted by the Supreme Court of Texas on July 24, 1968.

Points of Error Nos. 7 and 17 (after amendment) were set forth at pages 1 and 2:

POINT OF ERROR NO. 7 (AFTER AMENDMENT)

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land *without compensation and* without due process of law by the imposition of excessive standards of lateral support, *such taking of the petitioner's land being prohibited by the provisions of Article I. Section 17 of the Constitution of the State of Texas and by Section 1 of the Fourteenth Amendment to the Constitution of the United States.* (Germane to Points 11, 12, 13, 20 Motion for New Trial; Points 17, 18 Motion for Rehearing)"

POINT OF ERROR NO. 17 (AFTER AMENDMENT)

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land *without compensation and* without due process of law by the imposition of excessive standards of lateral support, *such taking of the petitioner's land being prohibited by the provisions of Article I, Section 17 of the Constitution of the State of Texas and by Section 1 of the Fourteenth Amendment to the Constitution of the* United States. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing) new material underlined."

SUPREME COURT, U. S.

FILED
NOV 15 1968
JOHN F. DAVIS, CLERK

No. 657

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	6
CONCLUSION	10
PROOF OF SERVICE	10

CITATIONS

Cases

Bailey v. Anderson, 326 U.S. 203 (1945)	3
Berea College v. Kentucky, 211 U.S. 45 (1908)	7
Bowe v. Scott, 233 U.S. 658 (1914)	2
Cantu v. Parr, 338 S.W. 2d 183 (Tex. Civ. App. 1960, error dism'd w.o.j.)	2
Consolidated Turnpike Co. v. Norfolk & O.V. Ry., 228 U.S. 326 (1913)	3
East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 223 S.W. 2d 613 (1949)	3
Gulfview Courts v. Galveston County, 150 S.W. 2d 872 (Tex. Civ. App. 1941, writ ref'd)	6
Hayes v. State, 342 S.W. 2d 167 (Tex. Civ. App. 1960, writ ref'd n.r.e.)	6
John v. Pollin, 231 U.S. 583 (1913)	3
Kimbrough v. Walling, 371 S.W. 2d 691 (Tex. 1963)	3
Leathe v. Thomas, 207 U.S. 93 (1907)	8
Masonic Grand Chapter of Order of Eastern Star v. Sweatt, 329 S.W. 2d 334 (Tex. Civ. App. 1959, writ ref'd n.r.e.)	2
Mellinger v. City of Houston, 68 Tex. 36, 3 S.W. 249 (1887)	2
New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928)	2
Oederkerke v. Muncie Gear Works, 179 F. 2d 829 (7th Cir. 1950)	9

PAGE

Phillips Pipe Line Co. v. Razo, 420 S.W. 2d 691 (Tex. Sup. 1967) 6

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 3

State v. Bilbo, 392 S.W. 2d 121 (Tex. 1965) 3

Street v. Sinclair Pipeline Co., 386 S.W. 2d 350 (Tex. Civ. App. 1965, no writ) 6

Williams v. Thompson, 152 Tex. 270, 256 S.W. 2d 399 (1953) 8

Constitutional Provision

Article 1, Section 18, Texas Constitution 2

Rules of Civil Procedure

Fed. R. Civ. P. 8(e) 9

Fed. R. Civ. P. 15(b) 9

Tex. R. Civ. P. 67 9

Tex. R. Civ. P. 94 9

Tex. R. Civ. P. 374 3

Other Authorities

Restatement of Property — Servitudes §§ 455, 456 (1944) 6

No. 657

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SAN JACINTO SAND COMPANY, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS FOR THE
14TH SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, Southwestern Bell Telephone Company, files this Brief in Opposition to the Petition for Writ of Certiorari filed by San Jacinto Sand Company, Inc., to review the judgment of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas (426 S.W. 2d 338, writ refused, no reversible error, Order of the Supreme Court of Texas, July 10, 1968; Motion for Rehearing overruled by Order of the Supreme Court of Texas, July 24, 1968.)

OPINIONS BELOW

The statement of petitioner concerning the opinions below is correct except that the Order of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered by order of the Court dated July 10, 1968.

JURISDICTION

This Court does not have jurisdiction to review the decisions below because the petitioner did not timely raise and preserve its contention that its rights under the Fourteenth Amendment of the United States Constitution had been violated. Until petitioner filed its First Amendment to Application for Writ of Error in the Texas Supreme Court, petitioner had never referred to the federal constitution. Petition at 21A-22A, Appendix C. Petitioner's references to "unconstitutional" action are assumed to refer to the Texas Constitution and rights thereunder rather than to the Federal constitution. *E.g., New York ex rel Bryant* v. *Zimmerman,* 278 U.S. 63, 67-8 (1928). Likewise, petitioner's references to "due process" are assumed to be referable only to the Texas Constitution.[1] *E.g., Bowe* v. *Scott,* 233 U.S. 658, 664-5 (1914).

Petitioner's so-called federal question was not timely raised. Its first reference to federal constitutional rights was made in its First Amendment to Application for Writ

[1] The term "due course of the law of the land" found in Article I, section 18 of the Texas Constitution is synonymous with the term due process. Typically the Texas courts refer to the state constitutional right as the right to due process. *E.g., Mellinger* v. *City of Houston,* 68 Tex. 36, 3 S.W. 249 (1887); *Masonic Grand Chapter of Order of Eastern Star* v. *Sweatt,* 329 S.W. 2d 334 (Tex. Civ. App. 1959, writ ref'd n.r.e.); *Cantu* v. *Parr,* 338 S.W. 2d 183 (Tex. Civ. App. 1960, error dism'd w.o.j.).

of Error in the Supreme Court of Texas. Under rule 374 of the Texas Rules of Civil Procedure it is necessary that a position be included in a statement of points in the brief before the court of civil appeals. See *State* v. *Bilbo,* 392 S.W. 2d 121 (Tex. 1965). Petitioner failed to include its so-called federal constitutional argument in this statement of points. Additionally, the Supreme Court of Texas will not consider points of error that were not raised in the Motion for Rehearing before the Court of Civil Appeals. *E.g., East Texas Motor Freight Lines* v. *Loftis,* 148 Tex. 242, 223 S.W. 2d 613 (1949); *Kimbrough* v. *Walling,* 371 S.W. 2d 691 (Tex. 1963). Having failed to comply with state procedural rules for the raising of federal questions petitioner cannot now assert this so-called federal question by way of petition for writ of certiorari. *E.g., John* v. *Pollin,* 231 U.S. 583, 585 (1913). By order of July 10, 1968, the Supreme Court of Texas refused petitioner's application for writ of error, noting that there was no reversible error. As previously noted, petitioner first raised federal constitutional questions in its First Amendment to Application for Writ of Error in the Supreme Court of Texas. The order of the Superme Court of Texas permitting amendment was entered without opinion in the same order in which the Supreme Court overruled petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended. (Order of Supreme Court of Texas dated July 24, 1968). Where a federal question is initially raised in a petition or assignment of errors filed in the highest state court which refuses to consider any issue not presented to the lower courts, the jurisdiction of this Court cannot attach. *Bailey* v. *Anderson,* 326 U.S. 203, 206-7 (1945). Only if the highest state court actually considers and disposes of the question so raised can this Court review the opinion. Raising the federal question for the first time in a petition for rehearing addressed to the highest state

court is insufficient unless the court actually entertains the petition and expressly decides the question *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945). To constitute a reviewable judgment under such circumstances, the order denying a petition for rehearing must be more than a cursory recitation that the petition was denied. *Consolidated Turnpike Co.* v. *Norfolk & O.V. Ry.*, 228 U.S. 326, 333-4 (1913).

Ignoring the fact that petitioner did not timely raise and preserve its federal constitutional contentions, the questions presented by petitioner may be expressed as follows:

QUESTIONS PRESENTED

1. Whether the Texas courts deprived petitioner of its property without due process of law by holding that petitioner's excavations must be limited in such a manner as to permit respondent to reasonably utilize its easement rights?

2. Whether petitioner was deprived of equal protection of the law by the Texas courts' holdings that the correlative rights of an easement owner and the owner of a tract of land burdened by easements are not equivalent.

Petitioner's third and fourth questions may be expressed in a single question:

3. Whether the Texas courts denied petitioner due process of law by holding (1) that petitioner had waived an affirmative defense by failing to plead it and (2) by holding that the affirmative defense issue had not been tried by express or implied consent.

STATEMENT OF THE CASE

Respondent, Southwestern Bell Telephone Company (Southwestern Bell) is the owner of two easements that burden a 17.584 acre tract of land located on the east bank of the San Jacinto River in Harris County, Texas. The easements were acquired by Southwestern Bell by written grants in 1945 and 1954. Pursuant to each of these easements respondent has installed various conduits, cables, and equipment. The equipment is an integral part of the communications system between Houston, Texas, and Beaumont, Port Arthur, and Orange, Texas.

In 1966 petitioner, San Jacinto Sand Company, acquired, for approximately $25,000, the 17.584 acre tract that was burdened by respondents' two easements. Petitioner acquired the land with actual and constructive knowledge of the two easements and the equipment placed pursuant to them.

The composition of the surface of the 17.584 acre tract is largely common sand and gravel. In November, 1966, petitioner began excavating sand and gravel from the tract in such a manner that the respondent's easements and equipment would have been destroyed. Petitioner's excavation operations were discontinued as the result of a temporary restraining order obtained by respondent.

The controling question in the case concerned the correlative rights, under Texas law, of an easement owner and the owner of the servient, burdened estate. Relying upon well-settled principles of Texas property law the trial court and court of civil appeals held that the respondent was entitled to the undisturbed use of its property for the purposes of the easements and that petitioner would not be permitted to excavate in such a manner that would injure or destroy the easements. The Supreme Court of Texas

ruled that there was no reversible error committed by the trial court or the court of civil appeals.

The proceedings below involved nothing more than a controversy between two owners of interests in land. Three Texas courts have passed on the controlling questions of the Texas law of easements. Petitioner now seeks to convert an ordinary state property law case into one involving federal constitutional issues. An examination of petitioner's reasons for granting the writ reveals that there are no constitutional issues involved in this case. Petitioner is simply complaining of the application by the Texas courts of traditional doctrines of property and procedural law.

REASONS FOR DENYING THE WRIT

1. *Petitioner's First Reason For Granting The Writ*

The courts below held that petitioner could not destroy respondent's easements and equipment placed pursuant to the easements. As a result of this holding, presumably, petitioner will not be able to recover as much sand and gravel as it could if it were not required to avoid destroying the easements. The courts' determination was based on the universally accepted rule of property law that the easement is the dominant estate and that the burdened land is the servient estate. Reinstatement of Property — Servitudes §§ 455, 456 (1944). Under this rule the easement owner is entitled to the reasonable enjoyment of its easements and the owner of the servient estate may not act inconsistently therewith. *E.g., Gulfview Courts* v. *Galveston County,* 150 S.W. 2d 872 (Tex. Civ. App. 1941, *writ ref'd*); *Street* v. *Sinclair Pipeline Co.,* 386 S.W. 2d 350, 352 (Tex. Civ. App. 1965, no writ); *Hayes* v. *State,* 342 S.W. 2d 167 (Tex. Civ. App. 1960, writ ref'd n.r.e.); *Phillips Pipe Line Co.* v. *Razo,* 420 S.W. 2d 691 (Tex. Sup.

1967). In reaching their decisions the Texas courts often referred to respondent's easements being entitled to lateral support. Petitioner argues that the judgments of the courts below went beyond the protection of lateral support and protected respondent's easements from the action of the adjacent San Jacinto River. Without regard to whether the action of the river should be taken into consideration in determining lateral support, petitioner's position ignores the rationale of the decision of the courts below. These courts simply held that respondent is entitled to the reasonable enjoyment of its interests in land and that petitioner, who had actual and constructive notice of these interests when it acquired the burdened property, may not destroy them. As the court of civil appeals opinion makes clear, this holding is required by universally accepted principles of easement law. (Petition at 12a-14a) Petitioner's constitutional argument begs the question. If, as the courts below held, respondent's easements are entitled to support and protection from the acts of the owner of the burdened tract, nothing has been "taken." Following the well-settled principles of easement law, the courts below held that respondent acquired this right to support or protection as one of the rights it acquired when it secured its easements.

Petitioner is arguing that if the substantive principle of state law by which it lost should be different, it was deprived of property without due process of law. Under this theory there is a federal constitutional question concerning the taking of property without due process of law in every case where one party is economically adversely affected by the decision. Every question of state law would involve a federal constitutional issue. Petitioner is simply dissatisfied with the results of this litigation. Clearly petitioner's approach must be rejected. *E.g., Berea*

College v. *Kentucky*, 211 U.S. 45, 53 (1908); *Leathe* v. *Thomas*, 207 U.S. 93 (1907).

2. *Petitioner's Second Reason For Granting The Writ*

The Supreme Court of Texas has held that the easement owner, in the reasonable enjoyment of its easement rights, may destroy the lateral support of the servient estate. *Williams* v. *Thompson*, 152 Tex. 270, 256 S.W. 2d 399 (1953). Petitioner argues that the failure of the Texas courts to adopt the converse of this holding, *i.e.*, the servient estate owes no duty of lateral support to the dominant estate, denied it equal protection of the law.

Clearly no constitutional issue is presented. Petitioner's position simply ignores the basis of the distinction between the two situations. Under Texas law as well as that of all other jurisdictions the easement constitutes the dominant estate and the burdened land the servient estate. The correlative rights of the owners of these interests in land are not equal. This was the holding of the Supreme Court in *Williams*.[2] As the dominant estate, the easement owner may destroy the lateral support of the servient estate if this is reasonably necessary to the enjoyment of the easement. Conversely, the owner of the servient estate may not injure the support of the easement if this is necessary to the reasonable enjoyment of the easement. This typical application of well-settled principles of property law does not raise constitutional questions.

---

[2] The court in *Williams* also relied on the fact that the complaining landowners acquired the burdened property with constructive notice of the easements and took subject thereto. In the present case petitioner also acquired the property with actual and constructive notice of respondent's easements and equipment.

3. *Petitioner's Third and Fourth Reasons For Granting the Writ*

Over five months after the trial of the case petitioner argued to the trial court that the respondent had abandoned its easements. Petitioner had not pled this defense and did not offer an amendment to its pleadings. The court of civil appeals held that the abandonment issue had been waived under rule 94 of the Texas Rules of Civil Procedure since the issue was an affirmative defense that should have been set forth affirmatively in petitioner's pleading. In this respect rule 94 is identical to rule 8(c) of the Federal Rules of Civil Procedure. Petitioner would also have waived the defense under the federal rule. *E.g., Oederkerk* v. *Muncie Gear Works,* 179 F. 2d 829 (7th Cir. 1950).

The court of civil appeals reviewed the record of the proceedings before the trial court and held that the issue had not been tried by the express or implied consent of the parties under rule 67 of the Texas Rules of Civil Procedure. Rule 67 is substantially identical to rule 15(b) of the Federal Rules of Civil Procedure. In reaching this conclusion, the court found, *inter alia,* that the primary evidence relied on by petitioner did not even relate to the abandonment of the easements.

Highly dissatisfied with these rulings of the Texas courts, petitioner makes the nebulous contention that it has been deprived of its constitutional rights. The decisions of the courts below were the products of the correct employment of procedural rules that govern all federal litigation and most state litigation. In no respect are constitutional issues raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, DAVID T. SEARLS, one of the Attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1968, I served copies of the foregoing Brief for Respondent in Opposition by mailing copies thereof to counsel for Petitioner, San Jacinto Sand Company, Inc.

David T. Searls

NOV 21 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 657

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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INDEX

	PAGE
GENERAL STATEMENT	1
THIS COURT DOES HAVE JURISDICTION	2
REASONS FOR GRANTING WRIT	
I. A declaratory judgment proceeding which is sui generis cannot be used to subvert the constitutional limitations on the taking of privately owned land without the payment of compensation	4
II. The petitioner is entitled to the protection of the rule in *Williams* v. *Thompson*, 256 S.W. 2d 399 (Tex. 1953) which denies to a landowner the right to compel an easement holder to provide lateral support for the landowner's land which abuts on the easement land	8
III. The petitioner is denied due process of law and equal protection of the law when a motion for judgment which raises an abandonment issue is not treated as an amendment to the petitioner's pleadings or as a proper basis for new trial	10
The nature of the declaratory judgment procedure	11
The petitioner's motion for judgment as an amendment to its pleadings	12
IV. The Court of Appeals denied the petitioner due process of the law when it presumed that the respondent's toll engineer's unequivocal testimony as to the abandonment in place of the respondent's pipes and cables did not mean that the respondent had not abandoned its easements	13
CONCLUSION	14
PROOF OF SERVICE	15
APPENDIX A-1	1a

CITATIONS

Cases

Bailey v. *Alabama*, 219 U.S. 219 (1911) 14
Bailey v. *Anderson*, 326 U.S. 203 (1945) 3
Cobb v. *Harrington*, 144 Tex. 360, 190 S.W. 2d 709 (1945)..... 11
Consolidated Turnpike Co. v. Norfolk & O. V. Ry., 228 U.S. 326 (1913) 3
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 9
Freeport Motor Casualty Co. v. *Tharp*, 406 Ill. 295, 94 N.E. 2d 139 (1950) 12
New York ex rel Bryant v. *Zimmerman*, 278 U.S. 63 (1928).... 3
New York Times v. *Sullivan*, 376 U.S. 254 (1964) 14
Northern Transportation Company v. *Chicago*, 99 U.S. 635 (1897) 7
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 4, 7
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 3
Simon v. *Nance*, 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.) 7
Stone v. *Farmers Loan & Trust Co.*, 116 U.S. 307 (1886) 5
Williams v. *Thompson*, 152 Tex. 270, 256 S.W. 2d 399 (1953) 8, 9

Constitutional Provision

U.S.C.A. Const. Amndt. XIV, Sec. 1 4

Rules of Civil Procedure

Texas Rules of Civil Procedure

Rule 67 13
Rule 94 13
Rule 299 13

IN THE

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SAN JACINTO SAND COMPANY, INC.,

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SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

REPLY TO BRIEF IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

GENERAL STATEMENT[1]

The jurisdictional issue raised by the respondent is an illusory one which evaporates when examined in the light of the record and the rules developed by this Court in respect to the timely raising of federal questions in state court proceedings.

---

[1] References to the record were inadvertently omitted from the Statement of the Case appearing in the Petition at pages 8 through 11. There is attached to this Reply as Appendix A-1 a reference to the parts of the record which are authority for the factual statements made in the Statement of the Case in the Petition.

The declaratory judgment proceeding involved in this case rests upon a constitutionally deficient principle, namely that the federal constitutional prohibition against the taking of a citizen's property without the payment of compensation *is not applicable* to a declaratory judgment proceeding, which does not set over a specified amount of land to respondent, *but merely prohibits the petitioner from excavating 314,370 cu. yds of sand and gravel which will preserve the respondent's easements from erosion by the San Jacinto River.* Constitutional rights cannot be destroyed by specious legal distincitions or by a resort to obtuse quais legal-economic considerations, such as the protection and preservation of the integrity of the thousands of easements that blanket the State of Texas, as was done by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas (Petition — Appendix A, p. 13a; 426 S.W. 2d 338, 345)

THIS COURT DOES HAVE JURISDICTION

The respondent urges this Court to decline to review this case because the federal constitutional question was not timely raised, that is that the federal question was first raised in a petition for rehearing.

The respondent has inaccurately described the record in the case. The federal constitutional question was timely raised by the petitioner's Motion for Leave to File First Amendment to Application for Writ of Error[2] which the

---

[2] By motion contemporaneously filed, this Court has been requested to allow the petitioner to enlarge the record before the Court to include a certified copy of the Motion for Leave to File First Amendment to Application for Writ of Error which was filed with the Supreme Court of Texas on July 19, 1968.

Supreme Court of Texas separately granted[3] on July 24, 1964, prior to the time that it denied the petitioner's Motion for Rehearing. The Court's order stated as follows:

> "Motion of petitioner, San Jacinto Sand Company, Inc., to amend application for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted, and that the application for writ of error be amended as prayed for therein."
>
> "And the Court having determined that the application for writ of error as amended presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused."

The test of whether the court of last resort of the state has been presented with and in fact considered a federal question is whether the court entertains and specifically decides the issue, and such decision is clearly indicated in the record. *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry.*, 228 U.S. 326, 334 (1913); *Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 128 (1945); *Bailey* v. *Anderson*, 326 U.S. 203, 207 (1945); *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). The foregoing test has clearly been met in this case, as evidenced by the Court's rulings as set forth above.

The Supreme Court of Texas, by its action in granting the petitioner's Motion to Amend the Application for Writ of Error, determined that there had been a compliance with all relevant sections of the Texas Rules of Civil Procedure.

The petitioner's Motion for Rehearing incorporated by reference the errors assigned in the Application for Writ

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[3] See Section 3 of Summary of the ground for new trial and assignments of error in which constitutional issues were raised (Petition — Appendix C, pp. 22a, 23a)

of Error as amended. The Supreme Court of Texas understood the scope of the Motion for Rehearing and entered its ruling on the basis that there had been a timely raising of the federal constitutional question. The third paragraph of the order of the Supreme Court of Texas dated July 24, 1968, read as follows:

> "And petitioner's motion for rehearing of application for writ of error and application as amended having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled. It is further ordered that petitioner, San Jacinto Sand Company, Inc., and its surety, Fidelity & Deposit Company of Maryland, pay all costs incurred on this application."

I.

A DECLATORY JUDGMENT PROCEEDING WHICH IS SUI GENERIS CANNOT BE USED TO SUBVERT THE CONSTITUTIONAL LIMITATIONS ON THE TAKING OF PRIVATELY OWNED LAND WITHOUT THE PAYMENT OF COMPENSATION

The respondent's argument in opposition to this issue fails to deal with the fundamental question of whether under Section 1 of the Fourteenth Amendment to the Constitution of the United States a declaratory judgment proceeding can be used as a subterfuge by which 314,370 cu. yds. of sand and gravel having a retail value of $424,399 and a royalty value of $47,156 can be taken from the petitioner without compensating the petitioner for such loss.

The constitutional limitation upon a court's powers which prohibits the taking of a citizens property without the payment of compensation is a fundamental part of our constitutional system. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The power to declare rights in a declaratory judgment proceeding is subject to the same constitutional

limitations as is the power of the State to regulate a common carrier. *Stone* v. *Farmers Loan & Trust Co.*, 116 U.S. 307 (1886). In the *Stone* case, *supra*, the Court in describing the state's authority to regulate a common carrier, said at page 331:

> "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fare and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without the due process of law. . . ."

The respondent's argument in opposition ignores the constitutional limitations applicable to the taking of 314,370 cu. yds. of sand and gravel without compensation by saying that this is simply a case where a defendant lost some land and is dissatisfied with the decisions of the lower court.

The Court of Appeals' affirmation of the trial court's action is predicated upon the fact that the trial court correctly applied the doctrine of lateral and subjacent support.[4] Under a guise of protecting the integrity of the respondent's easements and the thousands of other easements that blanket Texas, the Court of Appeals declined to correct the constitutionally excessive taking of the peti-

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[4] The Court of Appeals' position is succinctly summarized as follows (Petition — Appendix A, p. 13a; 426 S.W. 2d 338, 345):

> ". . . We hold that the owner of the dominant estate, the easement owner, is entitled to lateral and subjacent support for its easements, its lines and its property lawfully thereon, and that the trial court correctly applied the doctrine of lateral and subjacent support. . . ." (Citations omitted)

tioner's land to protect the respondent's easements from the erosive action of the San Jacinto River as required by the trial court.[5]

Subject to the right of the citizens of Texas to have the equal protection of its laws, as described in Issue II of the Petition, the petitioner acknowledges that the courts of Texas have the power to declare the existence of a right to lateral and subjacent support for easements, to define prospectively what is required to provide lateral and subjacent support for easements, and thereafter by injunctive process to prevent any interference with the lateral and subjacent support so decreed.

The action complained of by the petitioner in this Issue I is the failure of the courts of Texas to require that the respondent compensate it for the 314,370 cu. yds, of sand and gravel taken from it to protect the respondent's easements from erosion by the San Jacinto River.

The respondent should not be allowed to confuse the constitutional issue herein presented by:

(a) Inaccurate statements of the circumstances that would cause the respondent's easements to be destroyed, that is, by attributing the destruction of the respondent's

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[5] The trial court's position is set forth in its Findings of Fact Nos. 27 and 29 (R-Tr. pp. 135, 137 Findings of Fact and Conclusions of Law):

> "27. The nature of the soil on the 17.584 acre tract is such that its stable slope of repose is approximately 3 to 1; i.e., 3 feet of slope for each one foot of depth. This would take into account the presence of water, and the rising or falling of the river level but would not take into account the effect of river action or velocity of the current of the San Jacinto River on this soil. . . ."
>
> "29. The flow and velocity of the San Jacinto River must be taken into account in determining the effect of dredging operations and excavations on either side of the 30 foot strip within which Southwestern Bell Telephone's easements are located."

easements to the petitioner, rather than to the erosive action of the San Jacinto River; or

(b) An incorrect equating of the reasonable enjoyment of easements with the right to lateral support of easements. *Northern Transportation Company* v. *Chicago,* 99 U. S. 635 (1897); *Simon* v. *Nance,* 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.)

In equating the right of reasonable enjoyment of its easements with the right to have its easements protected from the erosive action of the San Jacinto River, the respondent stated its position as follows at page 7 of its reply brief:

> ". . . If, as the courts below held, respondent's easements are entitled to support and protection from the acts of the owner of the burdened tract, nothing has been 'taken'. Following the well-settled principles of easement law, the courts held that respondent acquired this right to support or protection as one of the rights it acquired when it secured its easements."

The simple answer to the foregoing statement is that it violates fundamental constitutional prohibitions against the taking of property without compensating the owner of the land which has been taken. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). In considering the analgous problem of the public's right to have a street supported which had been obtained in an eminent domain proceeding in which only surface rights had been acquired, this Court in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922) held that the public could not obtain support for the street without paying for it and said at page 415:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without

the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States".

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . ."

Neither the respondent through its unilateral act nor the courts of Texas through judicial fiat can enlarge the respondent's rights under its easements to include the protection of the easements from the erosive action of the San Jacinto River without compensating the petitioner for land taken from it.

II.

THE PETITIONER IS ENTITLED TO THE PROTECTION OF THE RULE IN WILLIAMS v. THOMPSON, 256 S.W. 2d 399 (TEX. 1953) WHICH DENIES TO A LANDOWNER THE RIGHT TO COMPEL AN EASEMENT HOLDER TO PROVIDE LATERAL SUPPORT FOR THE LANDOWNER'S LAND WHICH ABUTS ON THE EASEMENT LAND

The respondent's argument in opposition to the foregoing point is that the courts of Texas have fashioned two sets of

rules in respect to the lateral support of property subject to easements, namely (1) the easement holder does not have to provide lateral support for the land that is subject to the easement; and (2) the owner of the land subject to an easement must provide lateral support for the easement to which his land is subject.

The respondent incorrectly states the rule of *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (1953). The rule of the *Williams* case, *supra* is that the doctrine of lateral support is a doctrine applicable to *adjacent landowners* and is not applicable to the relationship that exists between the holder of an easement and the owner of the land subject to the easement.

The petitioner concedes that the common-law of Texas might ultimately produce the dual rules suggested by the respondent, *but until such time as the Supreme Court of Texas decrees the existence of dual rules,* the petitioner has been unconstitutionally deprived of the equal protection of the common-law of Texas as exemplified by the rule in *Williams* v. *Thompson,* supra; *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The constitution of the United States compels the reversal of the holdings of the lower courts, or in the alternative a remanding of the case to the Court of Civil Appeals for a determination under Texas law as to the applicability of the rule in *Williams* v. *Thompson, supra,* to the instant case.

III.

THE PETITIONER IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WHEN A MOTION FOR JUDGMENT WHICH RAISES AN ABANDONMENT ISSUE IS NOT TREATED AS AN AMENDMENT TO THE PETITIONER'S PLEADINGS OR AS A PROPER BASIS FOR NEW TRIAL

The respondent argues that the petitioner was five months late in pleading the respondent's abandonment of its easements and thus waived the defense of abandonment. The respondent's argument is in error both technically and in the implications that the respondent seeks to have drawn from the delay in the entry of the Final Judgment, which delay was the result of a mutual understanding reached by counsel for the petitioner and respondent.[6]

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[6] This proceeding was instituted when the respondent filed its original petition and requested and obtained a restraining order that *shut down the petitioner's entire operations.* The petitioner was informed after a hearing on the restraining order that a temporary injunction would be granted prohibiting excavations until the rights of the parties could be declared in a formal hearing. The trial judge indicated a willingness to adjust his schedule and give the parties an early non-jury hearing if they so desired. The *Hobson-like choice* presented to the petitioner was either an immediate non-jury trial without recourse to discovery procedures, or a hearing at some indefinite date in the future before which discovery procedures could be instituted in respect to the respondent's operations, *but during which period the petitioner's operations would be shut down.* The petitioner elected an early trial and the trial was held. When the trial court ruled against the petitioner, the petitioner's counsel, Charles J. Sullivan, and the respondent's counsel, Donald Howell, conferred and agreed that prior to the time that a judgment was submitted to the trial court for signing, Mr. Sullivan would seek to dispose of or otherwise handle in a manner satisfactory to him certain pending legal proceedings involving the 17.584 acre tract, *which were unrelated to the declaratory judgment proceeding.*

THE NATURE OF THE DECLARATORY JUDGMENT PROCEDURE

A declaratory judgment is neither legal nor equitable, it is sui generis, *Cobb* v. *Harrington,* 144 Tex. 360, 190 S.W. 2d 709 (1945). A natural concomitant of such a proceeding is that the equitable doctrine that *he, who seeks equity, must do equity* will be of paramount importance. As the moving party in a declaratory judgment proceeding *it was incumbent upon the respondent as an officer of the court* to state all relevant facts pertaining to its situation in clear, unmistakable and unambiguous language, for example it was the respondent's obligation to disclose the fact that it had made two initial installations and *thereafter abandoned in place* portions of such cables in connection with its replacements of its two existing underwriter cable crossings and *substituted at a new location a single and larger installation containing new and larger cables.*

Neither paragraph II nor paragraph III of the Plaintiff's Original Petition (R-Tr. pp. 3-5) clearly and unmistakably indicate the respondent's *abandonment in place* of portions of its original cables and the *installation of new cables at a new location.* When the skillfully drawn allegations set forth in paragraphs II and III of the Plaintiff's Original Petition are read in light of the evidence developed during the trial, the true nature of the respondent's position becomes apparent. Equally significant is the fact that the

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[6] Cont'd.

When the unrelated proceedings involving the 17.584 acre tract were taken care, counsel for the petitioner and respondent met and tried to formulate a mutually acceptable judgment. The parties did not reach agreement as to the form of the judgment and both the petitioner and the respondent submitted appropriate motions for judgment to the trial court. The petitioner's Motion For Judgment included a suggested Final Judgment that set forth the fact that the respondent had abandoned portions of its easements. The trial court *after an oral hearing* rejected the petitioner's Motion for Judgment in its entirety and entered the Final Judgment submitted by the respondent.

"gamesmanship" aspects of the respondent's plea for equitable and legal relief become apparent. The respondent's purposes, *but not justice's purposes,* are served when the respondent argues that the pleadings, including the petitioner's Motion for Judgment, do not place in issue the fact that the respondent was seeking lateral support for portions of its easements which it had already abandoned.

THE PETITIONER'S MOTION FOR JUDGMENT AS AN AMENDMENT TO ITS PLEADINGS

A declaratory judgment proceeding is not closed until the trial judge signs the final judgment in the case, at which time the judgment then officially becomes entered in the record. *Freeport Motor Casualty Co.* v. *Tharp, 406 Ill. 295, 94 N.E. 2d 139 (1950)*

The petitioner filed its Motion for Judgment and suggested Final Judgment with the trial court *prior to the time that the trial judge signed the Final Judgment in the case.* (R - Tr. pp. 79 - 96) The petitioner's suggested final judgment specifically raised the abandonment question.[7] In a declaratory judgment proceeding which is sui generis the filing of the petitioner's Motion for Judgment and suggested Final Judgment constituted a timely amendment of the petitioner's pleadings. *Freeport Motor Casualty Co.* v. *Tharp,* 406 Ill. 295, 94 N.E. 2d 139, (1950). This is especially true in light of the evidence in the record which clearly shows the fact and the intention on the part of the respond-

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[7] The issue of abandonment of portions of the respondent's easements was placed in issue by the Respondent's Trial Amendment to Plaintiff's Original Petition, which requested lateral support for the respondent's easements as they presently exist. (R-Tr. pp. 2-25; 124). When the Trial Amendment is considered in conjunction with paragraphs II and III of the Plaintiff's Original Petition, the scope of the respondent's existing easements was placed in dispute.

ent to abandon portions of its easements, namely the testimony of the respondent's Toll Engineer that the respondent had abandoned in place 197 ft. of its old pipes and cables (R-S.F. p. 32); documentary records of the respondent which showed the clear intention to abandon 197 ft of the easements (R-S.F., Pltf's. Exs. 15, 16; Defd's. Ex. 3, pp. 21, 29); the oral argument before the trial judge prior to the time when he signed the Final Judgment (R-S.F., supplemental pages 1-35).

In view of the foregoing facts the petitioner was unconstitutionally denied due process of law and equal protection of the law when the Court of Appeals determined that: (a) the abandonment issue had not been pleaded in a manner that satisfied the requirements of Rule 94 of the Texas Rules of Civil Procedure and accordingly had been waived; and (b) the issue of abandonment had not been tried by express of implied consent in a manner that satisfied the requirements of Rule 67 of the Texas Rules of Civil Procedure.

IV.

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF THE LAW WHEN IT PRESUMED THAT THE RESPONDENT'S TOLL ENGINEER'S UNEQUIVOCAL TESTIMONY AS TO THE ABANDONMENT IN PLACE OF THE RESPONDENT'S PIPES AND CABLES DID NOT MEAN THAT THE RESPONDENT HAD NOT ABANDONED ITS EASEMENTS

The petitioner was denied procedural due process and equal protection of Rule 299 of the Texas Rules of Civil Procedure when the Court of Civil Appeals refused to remand the case to the trial court on the ground that remand was unnecessary since the impact of the clear, absolute unequivocal testimony of the respondent's toll engineer

as to the abandonment in place of the respondent's cables (R-S.F. p. 32), *could be nullified by assuming that the engineer meant to say something other than what he actually said.* (Petition — Appendix A, p. 10a; 426 S.W. 2d 338).

"The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey* v. *Alabama,* 219 U.S. 219, 239 (1911); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). The Court of Appeals as an instrument of the State of Texas cannot presume a fact, which fact when once presumed has the effect of destroying a legal interest of the petitioner, namely the right to be free from the obligation of providing lateral support for easements which had in fact been abandoned.

CONCLUSION

For the reasons stated in Petition For Writ of Certiorari and in this Reply, the writ of certiorari should be issued.

Respectfully submitted

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Attorneys for Petitioner

AFFIDAVIT OF SERVICE

THE STATE OF TEXAS }
COUNTY OF HARRIS } ss.:

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES J. SULLIVAN, who after first being duly sworn did upon his oath depose and say:

The affiant, Charles J. Sullivan, did on this day cause a true and correct copy of the Reply to Brief in Opposition in the case of San Jacinto Sand Company, Inc. v. Southwestern Bell Telephone Company, Docket No. 657, to be served upon David T. Searls, attorney for Respondent Southwestern Bell Telephone Company, and upon Donald Howell and John L. Murchison, Jr., of Vinson, Elkins, Weems & Searls, by delivering the same to them at their office in the First City National Bank Building, Houston, Texas, and to James M. Shatto, Box 1530, Houston, Texas 77001, and James Hand, 308 South Akard, Dallas, Texas, 75202, by depositing a copy of such Reply to Brief in Opposition in a United States mailbox with first class air mail postage prepaid.

.....
CHARLES J. SULLIVAN

SWORN AND SUBSCRIBED TO BEFORE ME, the undersigned authority this ..... day of ....., 1968.

.....
Notary Public in and for
Harris County, Texas

APPENDIX A-1

References to Record That Support Facts Set Forth in STATEMENT OF THE CASE (Petition pp. 8-10)

Statement of the Case Page No.	Factual Statement	Record Reference
8	Findings of Fact Nos. 27 and 29	Tr. 135, 137
8	Trial court's order and judgment (a) Enjoining excavations in 200 ft. strip	Tr. p. 67
9	(b) Establishing variable excavation slopes	Tr. p. 68, 69
10	Recommendations to respondent by consulting engineers	S.F. Defd's Ex. 1, p. 6; Ex. 2, pp. 2, 3